

No. 2362

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

CALLENDER NAVIGATION COMPANY, a Corporation, Claimant of the Steamer "MELVILLE," Her Tackle, Apparel, Furniture, etc.,

Appellee.

Apostles.

Upon Appeal from the United States District Court for the District of Oregon.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names of Proctors.]

CLARENCE L. REAMES, United States Attorney,
ROBERT R. RANKIN, Assistant United States At-
torney,

Proctors for Appellant.

G. C. FULTON,

Proctor for Appellee. [1*]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

Libelant and Appellant,

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
Furniture, etc.,

Defendant.

CALLENDER NAVIGATION COMPANY, a Cor-
poration,

Claimant and Appellee.

Praeceptum for Apostles.

To the Clerk of the Above-entitled Court:

You will please prepare the apostles in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, upon the appeal heretofore perfected in this court, and include in said apostles the following pleadings, proceedings and papers on file, to wit:

*Page-number appearing at foot of page of original certified Record.

1. All those papers required by Subdivision One of Section One of Rule 4 of the Rules in Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit, and other matters thereby required.

2. All the pleadings in said cause including the libel of information, the stipulation, the claim and the answer. [2]

3. All the testimony and other proofs adduced in said cause.

4. The opinion of the court.

5. The final decree and the notice of appeal.

6. The assignments of error.

And prepare said apostles as required by law and the rules of the District Court of the District of Oregon and the rules of the said Circuit Court of Appeals for the Ninth Circuit.

Dated at Portland, Oregon, this 17th day of December, 1913.

ROBERT R. RANKIN,
Assistant United States Attorney. [3]

Statement of the Clerk of the United States District Court.

In the District Court of the United States for the District of Oregon.

No. 5920.

UNITED STATES OF AMERICA,

vs.

The Steamer "MELVILLE," Her Tackle, Apparel, Furniture, etc.

PARTIES.

Libelant: United States of America.

Defendant: The steamer "Melville," her tackle, apparel, furniture, engines, boilers, and machinery.

Claimant: Callender Navigation Co., a Washington Corporation.

PROCTORS.

Libelant: Clarence L. Reames, United States Attorney, and Robert R. Rankin, Assistant United States Attorney.

Defendant and Claimant: G. C. Fulton, Esq.

1913.

February 17. Filed verified libel.

March 4. Filed stipulation of Callender Navigation Co., waiving actual seizure of the "Melville" and publication of process herein.

March 4. Filed claim of the Callender Navigation Co., a corporation.

March 4. Filed answer of the Callender Navigation Co., a corporation, claimant.

March 20. Application to set cause for trial.

March 24. Order continuing time for setting cause for trial.

May 12. Order setting time of trial for June 25th, 1913, at 10 o'clock A. M. [4]

June 25. On this day the above-entitled cause came on regularly for hearing in the District Court of the United States for the District of Oregon, held in the courtroom thereof, in

the city of Portland, District of Oregon, before the Honorable C. E. Wolverton, Judge of said Court, and the following proceedings were had:

Mr. Geo. O. Mowry, Assistant United States Attorney, appeared for libelant, and G. C. Fulton appeared as proctor for defendant and claimant; whereupon Mr. Fulton moved to strike certain parts of the answer;

It is ordered that said motion be and the same is hereby granted; and

Thereupon H. F. McGrath was sworn and examined by the Government and thereupon the Government rests; and

Thereupon J. B. Yeon, S. C. Morton, G. H. Callender and M. F. Brady were sworn and examined as witnesses on behalf of the defendant, and thereupon the defendant rests, and evidence was closed; and

Thereupon, after argument of proctors for respective parties, the cause was submitted; and

Thereupon, the Court being fully advised in the premises, it is

ordered, adjudged and decreed that the libel be, and the same is hereby dismissed.

June 25. Final decree filed.
December 17. Filed notice of appeal.
December 17. Filed praecipe for apostles.
December 21. Filed assignment of errors.
December Filed stipulation as to hearing of appeal. [5]

In the District Court of the United States for the District of Oregon.

No. —.

UNITED STATES OF AMERICA,

vs.

The Steamer "MELVILLE," Her Tackle, Apparel, Furniture, etc.

Libel of Information, U. S. R. S. 4499.

To the Honorable Judges of the District Court in and for the District of Oregon:

Comes now George O. Mowry, Assistant United States Attorney for the District of Oregon, who prosecutes for the United States in this behalf, and being present herein in Court in his own proper person, in the name of and in behalf of the United States, brings this libel of information against the steamer "Melville," her tackle, apparel, furniture, etc., and against all persons intervening therein, in a cause of seizure and alleges and informs as follows:

I.

That heretofore, on, to wit, the 12th day of October, 1912, a certain vessel being a steamer called the "Melville," was used and employed in the transportation of passengers on the navigable waters of the United States, to wit, on the Columbia River in the District of Oregon.

II.

That on said 12th day of October, 1912, at St. Helens, Oregon, the said "Melville" did take on board and carry and convey therefrom on the said Columbia River to a point approximately opposite the St. Helens shipbuilding yards in said District of Oregon, a greater number of passengers than she was permitted by law to carry. [6]

III.

That the number of passengers stated in the said vessel's certificate of inspection duly issued by the duly authorized inspector for said district, and which she was entitled by law at said time to carry, was seventy-five (75), and that on said date and at said place, the said vessel took on board and carried on said voyage, one hundred and nineteen (119) passengers, contrary to the provisions and form of the statutes of the United States in such case provided, by reason whereof the owner or owners of said steamer, forfeited and became liable to pay to the said United States the sum of Five Hundred (\$500.00) Dollars, for the payment of which said sum the said steamer has become liable to be seized and proceeded against by way of libel and for the recovery of which this cause is now instituted.

IV.

That at the present time the said steamer "Melville" is within the said District of Oregon, and that all and singular the premises aforesaid were and are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

V.

WHEREFORE, the said Assistant United States Attorney for the United States, in behalf of the United States, prays the usual process and monition against the said steam vessel, her tackle, apparel, furniture and other appurtenances, in this behalf to be made, and that all persons interested therein may be cited to appear and answer the premises, and that this Honorable Court may be pleased to decree for the penalties aforesaid and that the said vessel may be condemned and sold to pay the penalties aforesaid, with costs, and for such other and further relief as shall to law and justice appertain.

(Signed) GEORGE O. MOWRY,
Assistant United States Attorney. [7]

United States of America,
District of Oregon,—ss.

I, George O. Mowry, Assistant United States Attorney for the District of Oregon, being duly sworn, depose and say that I have prepared the foregoing Libel of Information and that I know the contents thereof and verily believe the statements therein contained to be true, and that the same was prepared from information contained in reports, documents and records submitted to the United States

Attorney by the Collector of Customs, Port of Portland, Oregon.

(Sgd.) GEORGE O. MOWRY.

Subscribed and sworn to before me this 15th day of February, 1913.

[Seal]

CHARLES C. HINDMAN,
Notary Public for Oregon. [8]

[Acceptance of Service of Process.]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
Furniture, etc.

United States of America,
District of Oregon,—ss.

Due service of process in the above-entitled cause is hereby accepted at Astoria, Oregon, in the above district, this 18th day of February, 1913, by receiving a copy of the libel filed therein and a copy of said process therein issued on the 17th day of February, 1913, both duly certified to as such by George O. Mowry, Assistant United States Attorney.

CALLENDER NAVIGATION CO.

By _____,
President.

(Signed) G. C. FULTON,
Proctor for Deft. and Owner. [9]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
Furniture, etc.,

Claim of Vessel.

To the Honorable Judges of the District Court in
and for the District of Oregon:

Comes now the Callender Navigation Co., a corporation duly organized, existing and doing business under the laws of the State of Washington, and appearing before this Honorable Court, claims the above-named steamer "Melville," her tackle, apparel, furniture, etc., and states that it is the true and *bona fide* owner thereof and that no other person is the owner thereof.

CALLENDER NAVIGATION CO.

[Corporate Seal] By C. H. CALLENDER,
Secretary.

G. C. FULTON,
Proctor for Owner.

United State of America,
District of Oregon,—ss.

I, C. H. Callender, being first duly sworn, upon oath depose and say: That I am Secretary of the above-named Callender Navigation Co., a corporation, and that I prepared the foregoing claim to the above-named steamer "Melville," and that I know

the contents thereof and that the statements therein contained are true as I verily believe.

C. H. CALLENDER.

Subscribed and sworn to before me this 20th day of February, 1913.

[Notarial Seal]

G. C. FULTON,
Notary Public for Oregon. [10]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
Furniture, etc.

Stipulation.

WHEREAS, a libel of information was filed on the 17th day of February, 1913, by the United States Attorney for the District of Oregon, in behalf of the United States against the above-named steamer "Melville," her tackle, apparel, furniture, etc., for the reasons and causes in said libel mentioned; and

WHEREAS, the actual seizure of said steamer and the publication of process herein has been waived on the agreement of the Callender Navigation Co., a corporation, the owner of said steamer "Melville," to appear in said suit and file proper claim and stipulation; and

WHEREAS, a claim to said steamer has been filed by the said Callender Navigation Co.; and the said Callender Navigation Co., claimant, and C. H. Cal-

lender and L. F. Laurin, its sureties, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of said claimant, or its sureties, execution for the sum of One Thousand (\$1,000) Dollars, being double the amount claimed by the said libellant, may issue against their goods, chattels and lands:

NOW, THEREFORE, the condition of this stipulation is such that if the said Callender Navigation Co. the said claimant herein, and C. H. Callender [11] and T. F. Laurin, its sureties, shall abide by all orders of the Court, interlocutory or final, and pay the amount awarded by the final decree rendered by this court, or by any Appellate Court if any appeal intervene, then this stipulation to be void; otherwise to remain in full force and effect.

CALENDER NAVIGATION CO.

[Corporate Seal] By C. H. CALLENDER,
Secretary.

C. H. CALLENDER, (Seal)

T. F. LAURIN, (Seal)

Sureties.

Taken and acknowledged before me this 20th day of February, 1913.

[Notarial Seal] G. C. FULTON,
Notary Public, State of Oregon, Residing at Astoria,
Oregon.

United States of America,
District of Oregon,—ss.

We, C. H. Callender and L. F. Laurin, sureties above named, being first duly sworn, do severally de-

pose and say: That I reside in the District of Oregon and am a householder therein and am worth the sum of one thousand (\$1,000) dollars over and above all my just debts and liabilities, and exclusive of property exempt from execution.

C. H. CALLENDER.

L. F. LAURIN.

Subscribed and sworn to before me this 20 day of February, 1913.

G. C. FULTON,

Notary Public for Oregon, Residing at Astoria,
Oregon. [12]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
etc.,

Respondent.

Answer.

To the Honorable CHARLES E. WOLVERTON
and ROBERT S. BEAN, Judges of the District
Court in and for the District of Oregon:

The answer of Callender Navigation Company, owner of the steamer "Melville," her tackle, apparel and furniture, to the libel of the United States of America against said steamer "Melville," in a cause of contract, civil and maritime, and the said

respondent alleges and propounds as follows, that is to say:

I.

That this respondent is and at and during all the times in said libel mentioned was a corporation organized and existing under and by virtue of the laws of the State of Washington.

II.

That respondent, Callender Navigation Company, is now and was at and during all the times mentioned in said libel of information the sole owner of the said steamer "Melville," her tackle, apparel and furniture complete, and no other person had or has now any right, title or interest therein or thereto.

III.

This respondent answering unto paragraph numbered I of said libel of information admits the same, and the whole thereof.

IV.

This respondent answering unto paragraph numbered II of said libel of information denies the same, and the whole thereof, [13] and each and every allegation therein contained, and specifically denies that on the 12th day of October, 1912, or at any other time, or at St. Helens, Oregon, or elsewhere, the said steamer "Melville" did take on board, and did take on board and carry, or did carry or convey, from St. Helens, Oregon, or elsewhere, or on the Columbia River, or elsewhere, to a point approximately opposite said St. Helens, or elsewhere, or to the St. Helens Shipbuilding Yards, or elsewhere in the District of Oregon, or at all, a greater number of pas-

sengers than she was permitted to carry by law.

V.

This respondent answering unto paragraph numbered III of said libel of information admits that the number of passengers that said steamer "Melville" was authorized to carry on said October 12, 1912, was 75, but denies that on said date, or at said place, or at any time whatever, or at all, the said vessel took on board or carried on said voyage, or any voyage, 119 passengers, or any number of passengers to exceed 75 passengers, or any passengers contrary to the provisions or forms, or any provision or form, of the statutes of the United States in such case provided, and denies by reason whereof, or otherwise, or at all, the owner or owners of such steamer forfeited or became liable to pay to the United States the sum of \$500.00, or any sum or amount whatever, or for the payment of which said alleged sum, or any sum whatever, the said steamer has at any time become liable to be seized or proceeded against by way of libel, or otherwise.

VI.

This respondent answering unto paragraph numbered IV of said libel of information admits the allegations contained therein to be true.

AFFIRMATIVE DEFENSE.

This respondent, for a further and separate answer and defense to the matters and things set forth and averred in the libel [14] of information filed herein against the said steamer "Melville" by the United States of America, represents and shows to

this Honorable Court as follows, that is to say:

That heretofore, and on the 12th day of October, 1912, the respondent was the owner of the whole of that certain steamer "Melville," her tackel, apparel, furniture, boilers and engines complete, which is described and set forth in the libel of information filed herein, and on that date the St. Helens Shipbuilding Co. had constructed and completed a large steamboat named "Multnomah" at its shipbuilding yards on an island in the Columbia River, opposite the town of St. Helens and about a quarter of a mile from the dock at St. Helens, and it advertised that on said date, at about the hour of four o'clock P. M., the said "Multnomah" would be launched into the waters of the Columbia River, and invitations were extended to the public to witness the launching thereof, and for the purpose of permitting certain of its friends, citizens of Astoria, which did not exceed fifteen in number, witnessing the launching of said steamer "Multnomah" at the said shipyards aforesaid, chartered from respondent the said steamer "Melville" for a voyage from Astoria, Oregon, to the shipyards of the said St. Helens Shipbuilding Co. aforesaid and return. That, on the morning of October 12, 1912, the said steamer "Melville" left its dock at the city of Astoria, Clatsop County, Oregon, on its voyage to said shipyards of said St. Helens Shipbuilding Co., having on board not to exceed fifteen passengers. That said steamer arrived opposite the town of St. Helens at about the hour of 3:45 P. M. of said October 12, 1912. That said steamboat passed near a dock at the town of St.

Helens, when the charterer of said steamer "Melville" observed a very few of its friends on the said dock at St. Helens, who notified them by gestures and signs that they were unable to obtain transportation from said dock to the shipyards of said St. Helens Shipbuilding Co. That [15] the said friends did not exceed fifteen in number, and thereupon, as a mere matter of accommodation, and not otherwise, the said friends were notified by the master in charge of said "Melville" that the said "Melville" would stop for them, and that for that purpose alone the said "Melville" was run alongside of a dock in said town of St. Helens, but was not moored, but the gang-plank was run ashore for the purpose of permitting the said friends of the charterer to board said "Melville," not to exceed fifteen in number, and whilst said steamer was alongside of said dock but not moored, and otherwise fastened, a large number of persons and individuals unknown to the master or crew of said steamer forcibly and violently sprang aboard whilst the friends of the charterer were being assisted in boarding the same. That a number of them sprang from the dock down on board said steamer, whilst others got aboard from the sides and stern. That the master and crew of said steamer used all possible force to prevent the said individuals and parties from boarding said steamer, but were powerless to do so, and the said steamer was immediately backed away from said wharf out into the river, and when the same was cleared from said dock the master counted the said passengers and there were on board not to exceed seventy-five passengers

in all, but he did not dare return with said boat to the wharf or dock at St. Helens, for if he had, there were a large number of individuals and persons still left on the dock clamoring to be taken on board and would have forcibly gone on board said steamboat. Thereupon the said master of said "Melville" navigated said steamer to the said shipyards of said St. Helens Shipbuilding Co. and witnessed the launching of said steamer "Multnomah," and returned said passengers to the dock at St. Helens.

That the acts herein specified and alleged are the identical acts set forth and alleged in the libel of information, and the transportation of the passengers from said dock at St. [16] Helens to said shipbuilding plant of said St. Helens Shipbuilding Co. is the same incident related and set forth in the libel of information filed herein, and not otherwise, and your respondent avers that said steamer did not carry or take on board at said time, or at any other time, to exceed seventy-five passengers. That no charge whatever was made for said transportation, and those who did board said vessel at St. Helens, with the exception of about fifteen personal friends of the charterer, boarded the same forcibly and against the protest and consent of the master and crew, and it was utterly impossible to prevent them as well as it was utterly impossible to eject them therefrom, and a larger number would have boarded said steamer had the same been docked or moored at St. Helens. That the said master and crew of said steamer exercised all their powers to prevent the said passengers from going on board said

steamer, but were utterly powerless to do so.

Respondent, for a further and separate answer and defense, alleges:

That if, as a matter of fact, the said steamer "Melville" had on board on October 12, 1912, or carried at that time between St. Helens and the shipyards opposite thereto, more passengers than allowed such steamer by law, which, of course, respondent denies, it was through no fault or want of exercise of care on the part of the master or crew of said vessel, or the owner thereof, or any person connected with the management, navigation or operation thereof, for that on said October 12, 1912, the said steamer "Melville" was chartered for a voyage from Astoria, Oregon, to the said shipyards opposite St. Helens and return, and when opposite the dock at St. Helens there were about fifteen friends of the charterer on said dock who desired to be transported therefrom to the launching of the steamer "Multnomah" at the shipyards of the St. Helens Shipbuilding Co., opposite said St. Helens, [16½] and so indicated, and for the sole purpose of taking them aboard, said steamer was run alongside of the said dock, and said friends, amounting not to exceed fifteen, were assisted on board, and while assisting the same on board a number of persons unlawfully, wrongfully and violently and against the will, consent and protest of the master and crew of said steamer and those having it in charge, boarded said steamer, and in order to prevent more from getting aboard, the said steamer was immediately by said master and crew sailed therefrom, but not until a large number had jumped

aboard from various places along said dock and places adjacent thereto and without the knowledge and consent of and against the protest of said master and crew of said steamer. That said master did not dare to return to said dock with said steamer, for there were at that time a large number of additional persons who threatened to and would have come aboard said steamer, and said master and crew were powerless to exclude the said individuals therefrom. That there was not at the time said steamer reached said dock at St. Helens to exceed fifteen persons aboard said steamer, and according to the best information obtainable by the owner, there were not to exceed seventy-five people on board said steamer at any time, but if there were any more than that, it was beyond the power of the master and crew to prevent it.

WHEREFORE, respondent having fully answered, prays that the libel of information be dismissed, and that it have and recover its costs and disbursements herein.

CALLENDER NAVIGATION CO.

By G. C. FULTON,

Its Proctor.

G. C. FULTON,

Proctor for Respondent, Astoria, Ore. [17]

State of Oregon,

County of Clatsop,—ss.

I, C. H. Callender, being first duly sworn, on oath depose and say that I am Secretary and General Manager of the respondent, Callender Navigation

Company, a corporation organized under the laws of the State of Washington, and that I have read the above and foregoing answer to the libel of information filed against steamer "Melville" by the United States of America, and know the contents thereof, and that the same is true, as I verily believe.

C. H. CALLENDER.

Subscribed and sworn to before me this 1st day of March, A. D. 1913.

[Seal]

G. C. FULTON,
Notary Public for Oregon. [18]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
Furniture, etc.

GEORGE MOWRY, for Complainant.

G. C. FULTON, for Defendant.

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Portland, Oregon, June 25, 1913.

Mr. MOWRY.—Mr. Fulton will admit, I think,

(Testimony of H. F. McGrath.)

that the "Melville's" license only allowed her to carry 75 passengers.

Mr. FULTON.—I admit that in the pleadings.

[**Testimony of H. F. McGrath, for Government.**]

H. F. McGRATH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MOWRY.)

Mr. McGrath, you reside in Portland?

A. Yes.

Q. What is your official business?

A. Deputy Collector and Chief Inspector of Customs, this port.

Q. Was that your business and office on the 12th of October, 1912? A. Yes, sir.

Q. Were you down at St. Helens on that day?

A. I was.

Q. Did you see this steamer "Melville" there?

A. I did.

Q. Well, go ahead and state what you know about the "Melville" matter.

A. I was standing on the bow of the "T. J. Potter" when I noticed the "Melville" coming up from St. Helens. Her forward deck and the deck on each side of the cabin and aft seemed to be crowded with people. My first attention was called to it by two or three parties there stating—I guess more in a joshing way—"Well, now, Mac, you have got a job. I think that boat has got more passengers than we

(Testimony of H. F. McGrath.)

have got." I [20*—1†] immediately went to the hurricane deck, right aft of the pilot-house on top, and as the "Melville" came along I counted the passengers. She was coming sort of bow-on, coming around some other boats that were on the other side there, smaller craft she was passing. And I counted the people on the starboard side of her the best I could, along the side and on her bow, and then, of course, as she got right alongside of us, she wasn't more than 100 feet, and I finished up my count, and counted 119. That is what my ticker registered when I finished counting. And one of the things that had called my attention to the boat was the fact that about 15 minutes previous to that time the tug, or rather the fishing boat "Eureka," belonging to the Columbia River Packers Association, came up the river, and I had counted her passengers on her and found she had 75. I ran off the "Potter," and ran over to the place where the "Eureka" landed, and tallied her passengers off, and tallied up her life-preservers, and found that she had only 38 life-preservers.

Mr. FULTON.—I don't know, your Honor—excuse me—I don't know what that has to do with this case.

COURT.—This is another boat?

A. This is another boat. As to the relative size of the crowd—that is all.

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Testimony as same appears in Certified Transcript of Record.

(Testimony of H. F. McGrath.)

Mr. FULTON.—It is not owned by the Callender Navigation Company? A. No, no.

Mr. FULTON.—Well, then, I ask your Honor to strike that out.

A. Only just leading up to how I happened to count.

COURT.—Confine yourself to the “Melville.”
[21—2]

A. The “Melville” then went across, possibly 500 feet, to a log raft, where there were two rafts of logs moored, after she passed us. He ran her nose along the side there, and the full length of the boat alongside there, and a great many people got off on the log raft. And if I remember correctly, the boat backed up a little bit, so that those on the log raft might have an opportunity, or some of them went ahead on the log raft, and witnessed the launching from the log raft. And as she came back again, I took my same position and counted as she came back, and I counted 120 passengers. But I took the lesser amount, because I was not certain that the higher amount would go. And there was one other party that counted it, but that party is not here and not available as a witness, having died about a week ago. At that time I didn’t know that the “Melville” had carried an excess of passengers, until I arrived home on Monday, and I went into the Inspector’s office, and asked them whether or not the “Melville” had a permit, an excursion permit, and was informed that her passenger allowance was only 75. And there was nothing more for me to do then

(Testimony of H. F. McGrath.)

except make a report to the collector of the facts as I found them to exist.

Q. When you counted them the second time, you say that was when they were returning?

A. As they were returning, yes, sir.

Q. Now, in the meantime people had gotten off on the log raft, had they?

A. Yes, sir, some of them had gotten off on the log raft, to witness it, I suppose, on that side.

Q. And had gotten back on again?

A. Yes, sir. [22—3]

Q. And you counted 120 the second time?

A. Yes, sir.

Q. Do you know what is the number of the crew on the "Melville"?

A. I think her certificate says five.

Q. Five in the crew?

A. Yes, sir. I think there is master and one deck-hand, engineer and fireman, and one in the steward's department, I believe is the complement.

Cross-examination.

(Questions by Mr. FULTON.)

Did you see any of these people that you claim were passengers on the "Melville" get off the "Melville"?

A. Some of them went off on the other side.

Q. Wait a minute. I say, did you see them get off when the "Melville" was tied up alongside this log raft? Did you see any of them get off the "Melville"?

A. Well, I saw no people on the log raft when she

(Testimony of H. F. McGrath.)

pulled up alongside.

Q. Wait a moment, please. Let us have an understanding. You understand the question surely. You are intelligent enough for that.

COURT.—Answer the question, and then you may make such explanation as you desire.

Q. Did you see any person get off the “Melville” when it was up alongside this log raft you speak of? Now, that is the question. You can answer it yes or no.

A. I don’t think I could state positively I saw them get off, stepping off.

Q. Did you see any person, whilst the “Melville” was tied alongside of the log raft, get onto the “Melville,” get aboard?

A. I don’t know that I could swear positively to that. [23—4]

Q. We have no fault to find with you, Mr. McGrath, for making your complaint. That is all.

A. I understand that. I appreciate that.

(Examination by the Court.)

Q. How long did the “Melville” remain at this raft?

A. Possibly 20 minutes—25 minutes; something like that.

Q. Did it remain there during the launching?

A. Yes, sir.

Q. After the launching was over, it came back?

A. She came back; and as it came back past again, I counted the passengers.

Redirect Examination.

Q. Did you take notice of the log raft before the

(Testimony of H. F. McGrath.)

“Melville” got there? A. I think I had.

Q. Take notice whether there were people on the log raft?

A. Not to my recollection, there was not.

Q. There were not? A. No, sir.

Q. And after the “Melville” got there, did you see people on the log raft?

A. I did. Of course, there were others down below, all along on the opposite side, right opposite us, there were several of those small boats laying along there.

Recross-examination.

Q. Quite a number of boats moored up alongside of the log raft, were there not?

A. This side mostly of the “Melville,” yes, sir.

Q. I say, there was a considerable number of other boats moored alongside of the log raft?

A. Well, yes, of the log rafts. There were log rafts extending all along. [24—5]

Q. I mean, this same log raft?

A. There may have been a few more smaller ones up above there.

Q. As a matter of fact, it was quite a gala day, was it not, Mr. McGrath? A. Yes, sir.

Q. A great many people were down there to look at this launching? A. Yes, sir.

Q. It was quite an event.

Excused.

Mr. MOWRY.—I think that is all our case, your Honor. [25—6]

[**Testimony of J. B. Yeon, for Defendant.**]

J. B. YEON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. FULTON.)

Where do you live, Mr. Yeon? A. Portland.

Q. What is your business?

A. I am in real estate mostly.

Q. You are, I believe, the owner of the Yeon Building here? A. Yes, sir.

Q. And how long have you known Mr. Callender?

A. About 20 years.

Q. Are you in any manner interested, directly or indirectly, in the Callender Navigation Company?

A. No, sir, not the least.

Q. Are you interested, directly or indirectly, in the steamer "Melville"? A. No, sir.

Q. Or were you ever? A. No, sir, never.

Q. No interest in it at all? A. No.

Q. You say you have known Mr. Callender how long? A. Twenty years.

Q. How have been your relations with him as to being social and pleasant, or otherwise?

A. Very—simply social.

Q. Friendly, eh? A. Yes, sir.

Q. Been friendly a good many years?

A. Yes, sir.

Q. I wish you would tell the Court, in your own way, Mr. Yeon, you can tell it far better than I can have it detailed by [26—7] questions, just what

(Testimony of J. B. Yeon.)

occurred down there on October 12th last, when Mr. Callender brought the steamer "Melville" alongside the dock at St. Helens.

A. Why, when the launching of the "Multnomah" was to take place, I got an invitation from the Hermann Lumber Company to witness the launching. So we drove from Portland in an automobile, and I was a little bit late in arriving at St. Helens. And the understanding was that when we got to St. Helens we would have boat capacity to take care of us, to land us at the launching place. Well, we got on the wharf, and there were a whole lot of people there waiting, and we waited, I guess probably fifteen or twenty minutes, and the report came that there would be no more boat. The launching was just about to take place, and it was getting too late. So while talking the matter over, we happened to spy Mr. Callender coming down with his boat—coming up, rather, upstream—I would judge about 200 feet from the wharf. Mr. Brady was along with me, and sighted him first, and he says, "Here is Mr. Callender." And he says, "Now, we will hail him in, and go up and see the launching." So I says, "All right." We had to shout quite loud for awhile, before we could get him to understand who we were. Of course, the minute he spied us he whirled right around and came back right alongside of the wharf. At that time there were a lot of people there, that had been waiting the same as we had been, and felt very much disappointed that they couldn't go. And the minute that the boat landed and we went to get

(Testimony of J. B. Yeon.)

on, they just simply poured right into the slip, and it was almost impossible to stop them. They got on the railing on the [27—8] side, and they dropped on to the top from the wharf, which was above the landing where we were getting on, and they got in in all kinds of shape; and that was about the extent of it. We all got on—couldn't stop them, practically.

COURT.—Was there any effort made to stop them?

A. Yes. When we first began to get on, Mr. Callender was there himself, close to the gang-plank; but they wouldn't take no for an answer at all; just simply shoved one another right on; and they didn't have a word to say.

COURT.—Couldn't he get the gang-plank in?

A. If he had, it would have been a very dangerous proposition. They were getting in as it was at the side. If he had undertaken to pull away, I don't know how the consequences might have been. You know how it is with a lot of people getting excited and anxious to go any place, especially in a case of this kind. After we got them on, we dropped up above and landed alongside of a raft, and witnessed the launching, which I suppose probably was about 20 or 25 minutes all told. Then the boat pulled back up to the wharf, and went on.

Q. You are familiar with the "Melville," are you?

A. Why, no more than I have seen the boat. This is the first time I have been on her, at this time.

(Testimony of J. B. Yeon.)

Cross-examination.

(Questions by Mr. MOWRY.)

How many people do you think got on there at St. Helens, Mr. Yeon?

A. Well, sir, it is pretty hard for me to tell really, because we all got on in such a rush, and after we got on we didn't pay any attention to one another, you might say; didn't notice. [28—9]

Q. Did you leave very many on the shore when you got away?

A. I don't think there was anybody left.

Q. You don't think there was anybody left?

A. I don't think so.

Q. Took on all that was there?

A. I think so. It seems they all got on.

Q. When you stopped and witnessed this launching, you were at the log raft, you say?

A. Yes.

Q. Did you stay on board? A. Yes.

Q. How about the others? Did the others stay on board?

A. Well, sir, I didn't notice anybody getting on and off. We were just on the side towards the launching of the boat, and I didn't notice what was going on on the other side at all. I cannot recall that there was any got off or on.

Q. You were on one side most of the time, were you?

A. Yes, sir, I always stood on the side next to the launching.

(Testimony of J. B. Yeon.)

Q. The side next to the raft would be out of view of the launching?

A. Yes, it would be just opposite.

Redirect Examination.

Q. Aren't you mistaken about not leaving anybody on the dock there? Wasn't there more people left on the dock than you took on board?

A. Well, sir, I cannot say that I noticed anybody there.

Q. You are not sure about that?

A. They all rushed down and came in. That is the last thing I can remember.

Q. You are not certain about leaving more people on the [29—10] dock, a good deal, than you took?

A. No, I couldn't say about that.

Excused. [30—11]

[**Testimony of S. C. Morton, for Defendant.**]

S. C. MORTON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. FULTON.)

What is your business, Mr. Morton?

A. I am the auditor for the St. Helens Lumber Company and the St. Helens Shipbuilding Company.

Q. Where do you live? A. St. Helens.

Q. How long have you lived there?

A. About four years.

Q. Do you recall October 12th last?

A. Yes, sir.

(Testimony of S. C. Morton.)

Q. The incident that we are investigating here now? A. Yes, sir.

Q. Will you kindly tell the court, in your own way, what occurred there?

A. Well, we had made arrangements with the steamer "Modoc," after issuing all these invitations to people, to care for the crowd, but in some way the plans went wrong, and they didn't land a barge up there to land the people on at the shipbuilding yards; and she was very much delayed by that. So all the people from Portland and all around came down, and there wasn't any way to get over there except the "Modoc," which was making mighty few trips, and mighty slow between, so the dock just got loaded up with people. I was on the dock and trying to arrange to get them over to the shipbuilding plant. And after we had waited there, I suppose for an hour, why, I was on the lookout for the "Melville," knowing that she was coming up, and spied her coming up the river, and I ran and told my folks—I had my folks on the dock, too.

Q. Whom do you mean—your wife? [31—12]

A. Yes, I had my mother-in-law and my wife, and my sister-in-law and my two children, and my aunt—numerous friends from down at Astoria visiting us there. And I told them to stay on the dock there, and I would go and get Charlie Callender to come in there, if I could hail him. I edged my way out on the dock, right at the edge of the slip, and as he came, I recognized him and Herman Prael, and one or two others, and I halloosed to Callender to come

(Testimony of S. C. Morton.)

in, and also halloed to Herman Prael if he wanted his mother to see it he better make Callender come in. So he turned and wheeled around, and they came up to the slip, which is, I guess, an angle of about 30 degrees that slip runs there on the Columbia River Packing Company's dock. She stuck her nose in there at the far side of the slip, the "Melville" did, which left her bow covering the slip, and kind of threw part of her house up to the upper part of the dock. Just at the time she got in there, as has been explained, there was a mad rush to get on there. I finally got, after the people had been pouring onto her a few minutes, I finally got my people on, with Herman Prael and Callender's assistance, I got all mine on. And then I bent my energies towards stopping some of them, but you couldn't well do it. I couldn't stop them anyhow. The only reason they stopped was because they got so thick there in front, there couldn't any more get on unless they climbed over somebody else's shoulder. They just had to push them away, take the boat away and leave them standing there.

Q. Mr. Callender had charge of the boat at that time?

A. Yes, he seemed to be giving orders around there.

Q. He was trying to stop them, was he? [32—13]

A. He was.

Q. How many people did they leave on the dock when they went away?

A. That is hard to say. There were a few people

(Testimony of S. C. Morton.)

that didn't get to see it, a few that were on the dock didn't get to see the launching, and after we left the "Modoc" made one more trip down there, and I presume she must have brought up 40 or 50. I know McCormack tried to get on the "Melville" when she left, and he caught the "Modoc" when it came back. I was under the impression the "Modoc" wasn't coming back. The word had been passed around that the "Modoc" wasn't coming back. Everybody was kind of wild.

Q. Did you leave more people on the dock than you took on board the boat there, than actually went on board the boat?

A. I would be pretty positive that there was just about that many left there.

Q. You didn't take all of them?

A. No, we did not.

Q. Was there a gang-plank thrown out?

A. No, there was no gang-plank at all. She just put her nose up alongside the slip, and then she kind of swung in alongside the dock. Her nose was up against the slip, and her sides were pretty close to the dock, so that the more daring of the men just jumped from the upper part of the dock to her deck.

Q. I wish you would describe to the Court the incident you described to me there one time.

A. I will describe that more as an amusing incident. There was a rancher down there who had some of his relatives, I think it was his niece, visiting. She had three children with her. And he also had his wife there. I said, "No more, no more," [32½—14] as

(Testimony of S. C. Morton.)

they came to get on. In the meantime he had dropped one of his kids on—I had helped it on. I said, “No more.” And his wife had gotten on somewhere else. So he said, “Well take this one anyway.” So he pitched it to me, and I handed it to its mother. That left one of them on the deck. I think he came on over on the “Modoc” then. I held them back all I could.

Q. What efforts were made by the crew of the steamer “Melville” to stop them?

A. Well, I heard Callender say, “No more come on.” I heard Pete Jordan, the captain, say, “That is enough. That is enough. Don’t any more get on.” That is when I took my cue. I thought I would help them out a little.

Q. I wish you would state to the Court whether or not, in your judgment, it was possible to have stopped them from getting on.

A. No, I really think unless a man had used force with his fist or something, I don’t think you could have stopped that crowd. You couldn’t have stopped me. That is a cinch. I would have gone or there somehow or other. I wanted to see the launching, too, and thought it was the last chance to see it. If you had pulled the boat away suddenly, there would have been a crowd there of people dropping into the river, because they were just a solid bank.

Q. I wish you would explain to the Court from what quarters they got on. If there was no gang-plank out, I wish you would explain how so many people got on there.

(Testimony of S. C. Morton.)

A. The dock is arranged, we will say, like this, and this place here is a slip runs down.

Q. How wide is the slip?

A. I judge it must be ten to twelve feet, possibly. I know [33—15] when the "Melville" stuck her nose in the slip there, that up to the forward part of her house, that slip, just about covered it, looked like to me, and left all her forward deck bare there, you see, just so people could get on. And when she stuck her nose into the slip, it being about eight feet below the top of the dock, and swung around a little bit, that threw her house pretty near even with the dock, so that those people that were not on the slip, they were in just as good shape to step right over from the dock to the top of the "Melville."

Q. Yes.

A. And I saw quite a few men come that way. I didn't see any women, because they weren't quite so daring. I judge the distance was about three feet, and they just jumped over, and caught hold of the railing.

Q. Did they get on board from any other quarter, if you know?

A. No, they got on the whole length of the side of the boat.

Q. Do you know how long it is? A. That boat?

Q. Yes.

A. I judge the "Melville" must be somewhere about 86 to 100 feet long.

Q. You have known Mr. Callender a good many years, have you not? A. Yes, sir.

(Testimony of S. C. Morton.)

Q. A personal friend? A. Yes, sir.

Q. And you spoke about Herman Prael? He was one of the passengers?

A. He came up from Astoria on the boat, and his mother was in Portland. She came down from Portland there, and was staying with us. She was going over to witness it, and she recognized [34—16] Herman, and he saw his mother there, and I got him to come in. I take the responsibility for getting them to come in. I hallooed at them once or twice.

Cross-examination.

(Questions by Mr. MAURY.)

You really went on there at the invitation of Mr. Callender, didn't you?

A. No, sir. It was a self-made invitation. I hallooed to him to come in there.

Q. He was perfectly willing to take you on?

A. Yes.

Q. You and your folks with his friends?

A. Yes, that is what we called him in for.

Q. Of course, there was no effort made to keep you people from getting on? A. No, sir.

Q. You say there was an effort made to keep some of the rest of them from getting on?

A. Yes, when they began to crowd over there too thick, Pete Jordan, the captain, hallooed, "That is enough," and then effort was made to stop them. By that time the whole crowd had got started, when they saw that boat coming in, and you just couldn't stop them.

Q. It was all a friendly affair, though, wasn't it?

(Testimony of S. C. Morton.)

There wasn't any trouble about it?

A. Oh, no, no, there wasn't any blows, anything like that.

Q. There wasn't any violence at all?

A. There was not.

Q. They came on in a friendly manner, didn't they? A. Yes, sir. [35—17]

Q. Everything was friendly?

A. I guess it certainly was.

Q. How many people do you think were left on the bank?

A. There must have been a hundred people left on that dock when we left there, and quite a few on the Mill Company's dock.

Q. Why didn't they get on?

A. I say they couldn't get on. We left some standing on the slip there. They just said that was enough.

Q. And pulled out?

A. They pulled out, and we shoved them all back, as many as we could. I helped to do it.

Q. Was any effort made to count the passengers there at St. Helens, as far as you know?

A. As far as I know, there was no effort made.

Examination by the COURT.

Q. How many people got on after the captain said, "That is enough"? Have you any idea?

A. I guess there must have been fifteen or twenty, or more, who got on after that. He halloed that out for quite a while, and they were wedged in this slip down there, and they just kept on. I halloed that

(Testimony of S. C. Morton.)

was enough, too, there. There must have been fifteen or twenty got on. I know that man threw his baby after I told him that was enough. I couldn't throw it back to him, so I just kept it there.

Q. About what proportion of those people got on over the deck and not through the slip?

A. Well, I would make a rough guess of one-third, anyway. I was busy helping my folks on, and I didn't think I would ever [36—18] have to try to remember this again, and I just noticed a lot of them, especially the men, going on from the main dock. And we took all the women in through this way.

Excused. [36½—19]

[Testimony of C. H. Callender, for Defendant.]

C. H. CALLENDER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Fulton.)

Mr. Callender, just state what your business is.

A. Well, I am the secretary and general manager of the Callender Navigation Company.

Q. And the Callender Navigation Company is the owner of this steamer "Melville" here?

A. They are.

Q. Are you a master?

A. No, I am not. Captain Jordan was the master.

Q. I know; but you have been, have you not?

A. I have been, yes.

Q. You had carried a license?

A. I had carried a special license at the time they used to issue special licenses to an owner to operate

(Testimony of C. H. Callender.)

their own boat I carried it; but when that law was repealed, I never took out a regular captain's papers.

Q. How long have you been acquainted with the "Melville"?

A. Ever since she was built, about eight years ago.

Q. Give her size.

A. She is 89 feet long, 20 feet beam, 7-foot hold.

Q. Is she a good staunch, seaworthy boat?

A. She is; very heavy-built tug-boat.

Q. Very heavily built tug-boat? A. Yes.

Q. Used as a tug-boat mostly? [37—20]

A. Used as a tug-boat principally. We carry a passengers license just for accommodation. We have no passenger run and don't make a business of carrying passengers. We use her just for a pleasure boat occasionally. During our regattas down there, we like to take our friends out, and once in a while a regatta up at Cathlamet or some place, we like to take the boys out for a little fun—once in a while my wife gives a party; so we carry a passenger license on her for that reason.

Q. Who was captain of this boat that day?

A. Captain Jordan.

Q. Where is he now?

A. Well, he is aboard of the boat now, wherever she is.

Q. Why isn't he here?

A. Well, we couldn't reach him. The boat left Astoria three or four days ago on a long tow, and she hadn't gotten back last night when I left.

Mr. FULTON.—If your Honor thinks it advisable to have Captain Jordan here, we will get him here,

(Testimony of C. H. Callender.)

but they start out with this boat your Honor, and they are gone for a week.

COURT.—Gone out to sea?

Mr. FULTON.—He was captain of the boat at that time.

COURT.—Do they go out to sea?

Mr. FULTON.—No. No, he is on the Columbia River. But they start out with these tows, and they are gone for four or five days, and get along up, and we cannot get them here. We expected to get him here, and if your Honor or they think they should have Captain Jordan here, we would be very glad to have him.

A. During this high water and big freshet in the river, it is [38—21] all we could do to keep the sawmills going with logs. We couldn't—well, we could possibly, but I didn't like to take the boat off the job, because it takes all our boats to keep the upper mills going.

Q. I wish you would detail to his Honor here the facts pertaining to the taking and carrying of these passengers with which you are charged. Just explain it.

A. Well, I invited a few of my own friends in Astoria to make that trip, to go up and see the launching of this big ship. As long as it had been the first one that was launched in the Columbia River, it was quite an event. I think there were about 12 of 15 of us took the boat in the morning, and figured on getting up there possibly an hour before the launching—figured on looking around the

(Testimony of C. H. Callender.)

mill. We were a good deal longer coming up than we figured on. There was a pretty good current in the river. When we arrived at St. Helens dock, was going by there, we realized it was just about the time the ship was to be launched. Going by the wharf there, we saw quite a number of people on the wharf, and we heard somebody hallooing. And I looked over there and saw several of my friends there—Mr. Morton, Mr. Yeon and Mr. Brady, and Mr. McCormack, and two or three people from Astoria, Mr. Halterman and several others. So I sung out to the captain to swing around and make a landing, and we would pick those people up. As we went in there was a wide slip, possibly ten or fifteen feet wide. As we started to go in there, these people began to jump into that slip. We ran the nose of the boat in there, and Mr. Morton was pretty well back of the crowd with his folks, and in trying to get them through the crowd, and get them down there, [39—22] of course everybody began to jump aboard. I tried to hold them back. They all hallooed there was no other boat—“We can’t get up there.” In our efforts to get Mr. Yeon and Mr. Brady and Mr. Morton and the ladies aboard, this crowd kept piling in. I didn’t realize there was anybody coming on top of the boat till after we started to back away, I saw a whole crowd of them on the boat, jumping over on top of our house. Of course, we tried to stop them just as soon as I saw the rush. But when they started to crowd into the slip there like a lot of cattle, people on the back end

(Testimony of C. H. Callender.)

of the slip shoving the front ones aboard the boat, if the boat had pulled away very suddenly it would have pulled them all overboard. As soon as we stopped and got our boat away, we backed right away. We didn't have lines out or anything else. We just had her nose up against the dock. We stopped and backed her away as soon as we could, till they realized they was going to get overboard, then they hallooed "quit." We proceeded up close to the dock and along close to the log rafts. I don't think any of the time we was more than two or three lengths of the boat away from the shore. We tied up to the log raft right across from where the launching took place. As soon as the steamer was in the water we went right back to the dock and put this crowd off. I don't think it was over a quarter of a mile from the wharf up to where the ship was launched. It possibly might be a little more, but I don't think it is.

(Examination by the COURT.)

Q. You took the same crowd back that went over?

A. Yes, the same crowd went back. I don't think anybody got off. Of course, there were a few people, after the boat tied [40—23] up to the log raft, got off. I did. I was in the lumber business—while I was waiting there for the launching, I got off on the raft, and several people got off.

Q. Were there any people on the raft?

A. I think there were. There was a lot of these little fishing boats and pleasure boats, and two or three rafts of logs all up and down the slough, quite

(Testimony of C. H. Callender.)

a number of boats tied up there, and people walking around on the raft, as I remember.

Q. Do you remember whether any more people got on your boat?

A. No, I am satisfied there wasn't anybody got on there. I don't think they did.

Redirect Examination.

Q. Was there any charge made for any of these people?

A. No charge at all. We were simply out for a picnic.

Q. Would you have permitted these people to have gotten aboard, could you have avoided it?

A. I should certainly not. I didn't want them aboard there. We had a little party of our own, and we had some refreshments served in the cabin there, some sandwiches and things. We were just having a little party. I didn't want any strangers aboard the boat. I didn't know these people.

Q. They were not friends of yours?

A. I didn't know any of them, with the exception of just that few that I went in there to pick up.

Q. They were your old-time friends?

A. Yes, personal friends, and I didn't want to see them left out on the dock and miss the launching, after they had taken the trouble to come down from Portland in an automobile.

Q. This was a private picnic you were having in your own boat? A. Yes. [40½—24]

Q. You say you had refreshments on there?

A. We had a little—we had to have a little lunch,

(Testimony of C. H. Callender.)

you know; it was a long trip.

Q. You had those for your own personal use?

A. We had those for our own personal use.

Q. And it was only about a quarter of a mile run over to where the launching took place?

A. I would estimate about that. It might be a little bit more than that, but I don't think so.

Mr. FULTON.—I assume your Honor is familiar with the waters around St. Helens.

A. It is in a slough. It is not in the main river. From the St. Helens dock up to where we took these people, up to the shipbuilding plant, it is just a narrow slough. I don't think the slough is over a quarter of a mile wide.

Q. How is it protected against storms?

A. Absolutely no chance for any rough water in there. It is just like a millpond in there, just like a lake, up from the St. Helens boom to the mill, extends up clear to the shipbuilding plant, there were rafts moored clear along there. I don't think at any time we steered more than a couple of boat-lengths away from those logs. There was absolutely no danger at all.

Q. How many people could your boat at that time safely have carried?

A. We could safely put 200 people on that boat, without crowding her very much. Big open-deck tug-boat—she has open deck all the way around her. Her stern is a big open stern and her bow the same. And then on top of her house there is lots of [41—25] room. I think 200 people could be carried.

(Testimony of C. H. Callender.)

(Examination by the COURT.)

Q. You don't use it for passengers?

A. No, sir, I don't use it for passengers—never have. Never have had her on passenger run. She is a very finely built boat; nice cabin on the boat. I am proud to invite my friends to take a little trip with me once in a while. That is the reason we have a passenger license for her.

Q. What kind of a day was it?

A. It was about three o'clock in the afternoon.

Q. What kind—I mean what was the weather?

A. Fine day.

Q. Any wind?

A. Not a particle. It was a fine bright day and perfectly smooth.

Cross-examination.

(Questions by Mr. MOWRY.)

How many people do you think you left on shore there after the boat left?

A. It is pretty hard to make an estimate of how many were left on the shore. I know we left a big crowd on the dock there. It is pretty hard to estimate the number of people in a crowd. You take a bunch of people out on the street, and you couldn't guess their number.

Q. You wouldn't want to offer a estimate?

A. No.

Q. Would you think over 50?

A. I think there would be at least that or more.

Q. Do you think there would be 100?

A. I didn't pay any particular attention. I was

(Testimony of C. H. Callender.)

out on the [42—26] launch, and there were lots of people up on top of the boat as I got her in the slip.

Q. Those people that were left back there on the shore were men, women and children, were they?

A. Yes, surely.

Q. And the people that got on board were men, women and children?

A. The people that got on board were men, women and children.

Q. There were about as many women as there were men, weren't there? A. I should judge so; yes.

Q. And quite a few children?

A. A few children, yes.

Q. What effort did you make to stop them? There wasn't any violence used?

A. No violence. I just simply told people, "This is a private party. We are not a passenger boat, and we don't want to take anybody up there." But it had about as much use as throwing water on a duck's back. They didn't pay any attention to it—just came clambering up the side.

Q. How many people do you think were on when you pulled out?

A. I don't have the slightest idea.

Q. At that time how many did you think?

A. I didn't know. At the time we started to stop the people getting aboard, I didn't think we had too many people on the boat, or I certainly would have stopped.

Q. You didn't think you had more than 75 on?

(Testimony of C. H. Callender.)

A. No, I didn't know we had. I didn't know any were getting on top back there.

Q. When you got over to the log raft, you went up close so [42½—27] people could get off on it?

A. We went up and tied up to the log raft.

Q. You got off on the raft yourself?

A. I got off on the raft myself, yes.

Q. A few others got off?

A. A few others of us got off.

Q. At that time you could have forced these people to get off?

Q. We could have forced these people to get off on the log raft. We wouldn't want to put a lot of people that wasn't accustomed to walking on logs out on a log raft.

Q. Wasn't the log raft up on an island?

A. The log raft was moored to dolphins, piles, away from the shore; those piles that were driven out there.

Q. People could go from the log raft over to the island, couldn't they?

A. They couldn't without a boat.

Q. Your boat, you say, you think could safely carry 200 people? A. I think so, very safely.

Q. Could have been 200 people on board, and you wouldn't have considered there was any danger of sinking? A. No, sir, not a bit.

Q. Or capsizing? A. No, sir.

Redirect Examination.

Q. Speaking of this log raft, Mr. Callender, you are a logger? A. I am.

(Testimony of C. H. Callender.)

Q. I wish you would state to the court whether or not a person that is unused to walking on these rafts, or log rafts such as this was,—would it be safe for them to attempt it?

A. It certainly would not. People that are not accustomed to [43—28] going on sawlogs have no business getting on a log raft. They took big chances of going overboard.

Q. Supposing you had forced these people off on this log raft, what is your judgment it would have been?

A. It would have been in my judgment a very unwise thing, been unsafe. Lots of them would be liable to jump in the river.

Q. Would have been drowned?

A. We didn't want to drown anybody.

Q. Not that day? A. No.

(Examination by the COURT.)

Q. What effort did the captain make?

A. The captain was up in the pilot-house, and he sang out to me, as soon as he saw this crowd coming on—he says, “Look here, you are getting too many on here. Stop them as soon as you can.” I told him to back her away slowly, and see if we can check them up a little bit. He commenced to back up slow, so we could convince people we were leaving there. The people on the back end of the dock couldn't see—they kept shoving. The people in front were powerless to help themselves. They either had to go in the river or jump aboard the boat. The crowd on the back of the slip was pushing so

(Testimony of C. H. Callender.)

hard—a crowd of people like that.

Q. When you took out a license, was it your purpose to take out what the boat would carry?

A. No, sir.

Q. Or what did you intend to take out?

A. The license was taken out just for convenience, and what we thought we could accommodate in our cabins. The inspectors [44—29] won't give you a license for people to carry on deck. You have got to have passenger accommodations, so in case of storms you can put your passengers all inside of your house. This boat has a very small house compared to the size of the boat. It is a big open-deck boat.

Redirect Examination.

Q. Was it your intention when you landed there at the dock to take—how many people did you intend to take on board?

A. I just intended to take our friends.

Q. About how many of them were there?

A. I suppose there were fifteen or twenty there altogether. Not over that.

Recross-examination.

Q. About the captain—I didn't quite get that. You said the captain sung out?

A. He sung out to me, yes. He was up in the pilot-house. He couldn't see how many people were getting aboard down there, but he realized there was quite a crowd coming, and he sung out to me to stop those people; there was enough.

Q. Did he make any objection to pulling out with the crowd on?

(Testimony of C. H. Callender.)

A. No, he didn't make any objection to pulling out with the crowd on, because he didn't realize that we had more than we were entitled to.

Q. He didn't think you had on more than you were entitled to?

A. No, he didn't have time to go around and look around the boat. I don't suppose that he knew that there was over the crowd.

Q. (Redirect.) I understood you to say that it would have been absolutely unsafe to have pulled the boat out until the people [45—30] behind realized that the boat was pulling out?

A. It certainly would have been, because if we had those people on the front of that slip would have gone overboard. There was no way to protect them, and the people behind were shoving and crowding and yelling, you know.

Excused. [46—31]

[**Testimony of Michael F. Brady, for Defendant.**]

MICHAEL F. BRADY, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. FULTON.)

Where do you live, Mr. Brady?

A. 742 Thompson Street, City of Portland.

Q. How long have you lived in Portland?

A. Oh, I lived here for the last forty years, I guess.

Q. What is your business?

A. I am in the railroad supply business.

Q. Where do you office?

(Testimony of Michael F. Brady.)

A. In the Yeon Building.

Q. Are you acquainted with Mr. C. H. Callender?

A. I am.

Q. How long have you known him?

A. I have known Mr. Callender the last six or seven years.

Q. Were you at St. Helens last October, at the time the steamboat "Multnomah" was launched by the St. Helens Shipbuilding Company? A. Yes.

Q. I wish you would explain to the Court here just what occurred there about the passengers getting on the boat, and all about it; whether or not the boat could have prevented it and all that. Just explain generally to his Honor.

A. I was invited down with Mr. Yeon in the machine to witness the launching of that boat. And after we arrived down there they told us that all the boats had gone to the launching and there was no more boats going up there. And while a number of our party were standing on the dock, why, Captain [47—32] Callender's boat came along, and we halloed to them out in the stream. He turned around and recognized us, and he wheeled around and came in to the dock. When he got up in there, of course, we were glad to get up there and see the launching. And they got aboard—quite a number of people got on there when we got on. I don't know whether they were all friends of Mr. Callender's or not. And we went up there. That is all I know.

Q. Just describe to the Court what took place there when the boat landed.

(Testimony of Michael F. Brady.)

A. Oh, when the boat landed there was a great rush to get on this boat. Gee—they were running in from up above, and below, and all over. I never saw such a rush, there getting on the boat.

Q. Did you observe any attempt, the attempt Mr. Callender made to stop them?

A. Mr. Callender was on the lower deck, and he was hallooing to the people not to come on, no more; just kept hallooing until after the boat was pulling out there.

Q. When this rush was on, I wish you would state to the Court whether or not, in your judgment, it would have been safe to have pulled the boat away while the jam was there.

A. Well, if they had pulled the bow of the boat while the gang-plank and that whole crowd was there, they would all have gone down between the boat and the dock there.

Q. The crowd behind?

A. Yes. I would judge there was quite a number on the dock left when the boat pulled out, too.

Q. Quite a number on the dock left?

A. Yes. [48—33]

Q. I wish you would state to the Court your honest opinion as to whether or not the officers of this boat could have prevented these people from going on there.

A. Well, they did. Captain Callender hallooed to them to get off the gang-plank, when they were pulling out there. That is the reason there were quite a few left on the dock there.

(Testimony of Michael F. Brady.)

Q. There was no gang-plank put out, was there?

A. I think there was. I am not sure. I think there was a gang-plank.

Q. You think they couldn't have been prevented?

A. No, I don't think it could be.

Q. That is, those that got on board you couldn't have kept them off?

A. Yes. Oh, no, you couldn't have.

Cross-examination.

(Questions by Mr. MOWRY.)

There wasn't any force used to keep them off, was there? A. No.

Q. None whatsoever?

A. I heard Mr. Callender hallooing to keep back.

Q. Just to keep back? A. Yes.

Q. Of course, if he had used force, he might have been able to keep some of them off, couldn't he?

A. Well, if he had hauled around that way, they were getting in where the bow was, they would have gotten into the river, I think, the way the crowd rushed aboard there.

Q. How many people do you think were left on the bank? [49—34]

A. I would judge there was forty or fifty people on that dock when that boat pulled out.

Q. Men and women?

A. Men and women, yes.

Q. Were there most men or women?

A. I didn't notice. The crowd was disappointed. Everybody was disappointed down there.

Q. And there were men and women both that got

(Testimony of Michael F. Brady.)

on the boat there, were there?

A. Oh, yes; yes.

Q. Did you get off over at the log raft?

A. No, I should say I wouldn't dare to get off there. If you got off on that log raft, the raft was away out from shore.

Q. You stayed on the boat, yourself? A. Yes.

Redirect Examination.

Q. What character of force would have been necessary, in your judgment, to have stopped that rush of people?

A. I don't know. You would probably have to get a club at them when the boat got in there. They were all disappointed. Everybody wanted to go up there, you know.

Excused. [50—35]

Mr. FULTON.—I will say, your Honor, we don't have the captain, and I trust your Honor will not consider that as any evidence against us.

COURT.—Of course, the Court understands the conditions under which the captain is not here.

Mr. FULTON.—We have a large number of other witnesses, but I don't think it is necessary to take up the time of your Honor. We can call forty on that. I think that is our case.

COURT.—Have you anything on rebuttal?

Mr. MOWRY.—We have no further witnesses, your Honor, no. [51—36]

COURT.—In this case there is no doubt but what there were more passengers carried than the boat

(Testimony of Michael F. Brady.)

was licensed to carry; but when the boat left with the passengers, it is not clearly shown that the officers knew that they had an overload, or more passengers on the boat than the boat was licensed to carry. But I think the crux of this case is simply this: Whether the officers of the boat and the owners of the boat, or the company which owned the boat, wilfully intended to violate the law. It appears to me that there was no intention here to violate the law. In the first place, there was no intention of taking on any passengers, only a few who, together with those that were on the boat, would not amount to half the number of people that the boat was licensed to carry. But when the boat landed, or rather when the boat touched so those passengers could come aboard, people came in great crowds, and they could not be kept back. And furthermore, while the persons on the bow of the boat were attempting to keep off those coming down the slip, people were getting on over the deck, and the officers had no knowledge of that fact, and there was no way of keeping count of the people that came on board, either on deck or below. And when the boat got away, it is very evident that, had it landed again, it would have had the same trouble in keeping back passengers, and probably would have had more on in a very short time. Everybody knows the persistence of a great crowd of that kind. It is hard to control them. I think there was no intention on the part of these people to violate the law, and consequently I will dismiss the complaint. [52—37]

[Endorsed]: # 5920. United States vs. Callender Navigation Co. Testimony. Filed Nov. 28, 1913. A. M. Cannon, Clerk. By G. H. Marsh, Deputy.

[Decree of Dismissal.]

No. 5920.

THE UNITED STATES OF AMERICA,

vs.

The Steamer "MELVILLE."

This cause came on regularly for trial at this time, Mr. Mowry, Assistant United States Attorney, appearing for the plaintiff and Mr. Fulton appearing as proctor for the defendant; whereupon, upon motion of Mr. Fulton to strike certain parts of the answer, it is ordered that said motion be and the same hereby is granted, and thereupon H. F. McGrath was sworn and examined on the behalf of the Government, and thereupon Government rests, and thereupon J. B. Yeon, S. C. Morten, G. H. Callander and M. F. Brady were sworn and examined as witnesses on behalf of the respondent, and thereupon respondent rests and evidence closed, and thereupon, after argument of proctors for respective parties, cause submitted and thereupon the Court being fully advised in the premises, it is ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed. [53]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

Libellant and Appellant,

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
Furniture, etc.,

Defendant.

CALLENDER NAVIGATION COMPANY, a Cor-
poration,

Claimant and Appellee.

Notice of Appeal.

To the Claimant Callender Navigation Company, a
Corporation, and G. C. Fulton, Esquire, Proctor
Therefor.

You will please take notice that the libellant above
named hereby appeals from the final decree made and
entered herein on the 25th day of June, 1913, to the
next United States Circuit Court of Appeals for the
Ninth Circuit, to be holden in and for said Circuit,
in the City of San Francisco, California.

Respectfully,

CLARENCE L. REAMES,

United States Attorney.

ROBERT R. RANKIN,

Assistant United States Attorney.

Dated at Portland, Oregon, this 12th day of De-
cember, 1913. [54]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

Libellant and Appellant,

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
Furniture, etc.,

Defendant.

CALLENDER NAVIGATION COMPANY, a Cor-
poration,

Claimant and Appellee.

Assignments of Error.

The above named libellant and appellant hereby assigns error to the decree of the District Court of the United States for the District of Oregon, in the above-entitled cause, as follows:

I.

The Court erred in decreeing that the libel of information herein be dismissed.

II.

The Court erred in not decreeing that the libellant herein have judgment for the penal sum of Five Hundred Dollars as prayed for in said libel, and costs.

III.

The decree of said Court is contrary to the law and evidence herein.

Dated at Portland, Oregon, this 17th day of December, 1913.

ROBERT R. RANKIN,
Assistant United States Attorney. [55]

**Certificate of the Clerk of the United States District
Court to the Apostles.**

United States of America,
District of Oregon,—ss.

I, A. M. Cannon, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that the foregoing and hereunto annexed — pages contain a full true and correct transcript of the record in said District Court, made pursuant to the Rules of the Circuit Court of Appeals in Admiralty cases, and the praecipe filed by Robert R. Rankin, Assistant United States Attorney.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 26 day of December, 1913, and of the Independence of the United States, the one hundred and thirty-seventh.

[Seal]

A. M. CANNON,
Clerk of said District Court. [57]

[Endorsed:] No. 2362. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Callender Navigation Company, a Corporation, Claimant of the Steamer "Melville," Her Tackle, Apparel, Furniture, etc., Appellee. Apostles. Upon Appeal from the United States District Court for the District of Oregon.

Received and filed December 29, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
United States Circuit Court
of Appeals
for the Ninth Circuit.

IN ADMIRALTY.

UNITED STATES OF AMERICA
Libellant and Appellant

vs.

THE STEAMER "MELVILLE," her Tackle,
Apparel, Furniture, Etc.
Defendant

CALLENDER NAVIGATION CO., a Corpo-
ration,
Claimant and Appellee.

Brief of Appellant.

STATEMENT OF FACTS.

This is a libel *in rem*, in admiralty, against the Steamer "Melville," to recover a penalty incurred by carrying more passengers than permitted by her certificate of inspection.

The facts constituting the government's case are

practically undisputed: On the 12th day of October, 1912, the certificate of inspection, issued to the river tugboat "Melville," under Section 4464 of the Revised Statutes of the United States, allowed that boat to carry the total number of 75 passengers. The official machine count of the deputy collector and chief inspector of customs of the Port of Portland, showed that on said date, the "Melville" carried one hundred and nineteen passengers. This was a violation of Section 4465 Revised Statutes of the United States, and Section 4499 thereof provides a penalty of \$500 for each such violation. To recover this penal sum said libel was filed by the United States.

The answer to this libel denied carrying more than the licensed number of passengers, but the testimony taken at the trial, shows conclusively, and the trial court found that the excess number of passengers was carried. The defense sounds in an excuse of the violation by reason of lack of intent and knowledge on the part of the captain of the boat and manager of the claimant company by reason of the following alleged extenuating circumstance:

The "Melville," Captain Jordan, with C. H. Callender, secretary and general manager of the claimant company, and his party aboard, was bound from the city of Astoria to the town of St. Helens, both places being on the Columbia River, in Oregon, to attend a launching. As the "Melville" was passing the wharf at St. Helens, on its way to the docks where the launching was to occur, friends of Mr. Callender, recognizing his boat, attracted his attention, and on recognizing them,

Mr. Callender ordered the captain to land and pick the people up.

There was a large crowd on the wharf, anxious to attend the launching and as the "Melville" lay at the wharf unattached, with her prow in the slip, the crowd, probably unaided by a gang plank, came on the boat over the prow and from the wharf onto the upper deck.

It was a friendly crowd and when the captain observed that many were coming on board, he called out: "That's enough. Don't any more get on." Mr. Callender and Mr. S. C. Morton, a friend who had just come aboard, called out in similar effect and not more than fifteen or twenty persons got on after the warning. The crowd was anxious but orderly; no violence was used by any party and no effort made to keep the crowd off the boat other than by verbal demands.

The captain of the boat as well as the manager of the company, made no objections to pulling out into the stream with their passengers, consisting of men, women and children, because they did not suppose they had an excessive number, or else, as Mr. Callender states: "I certainly would have stopped."

The "Melville" steamed up stream to the docks and rested broadside along a log raft onto which many of the boat's passengers went to there witness the launching. The "Melville" remained here some twenty or twenty-five minutes, and after the new vessel was in the water, those on the rafts, without even verbal opposition, again boarded the "Melville" and were carried back and landed at the wharf.

The Court in its opinion said: "But I think the

crux of this case is simply this: Whether the officers of the boat and the owners of the boat, or the company which owned the boat, wilfully intended to violate the law.
 * * * I think there was no intention on the part of these people to violate the law, and consequently I will dismiss the complaint.”

Quere 1. Is intention or knowledge of the wrongdoer an element of this offense?

Quere 2. Is the “Melville” liable to a penalty for violating a federal law?

SPECIFICATION OF ERRORS.

The errors specified as reasons for this appeal are that:

I.

The court erred in decreeing that the libel of information herein be dismissed.

II..

The court erred in not decreeing that the libellant herein have judgment for the penal sum of five hundred dollars and costs, as prayed for in said libel, because it is conclusively proven that the defendant violated a law of the United States.

III.

The decree of the court is contrary to the evidence in that a violation of the law is conclusively proven and admitted by the trial court, and the decree is contrary to law in that it is not necessary for the Government to prove unlawful intent and knowledge of unlawful acts

in *mala prohibita* offenses, made such by a statute intended to protect life and property.

POINTS AND AUTHORITIES.

I.

The following statutes make the act charged, an unlawful one, fix the penalty and define the method of recovering the same.

(a). Section 4464 of the Revised Statutes of the United States, reads as follows:

“The inspectors shall state in every certificate of inspection granted to steamers carrying passengers, other than ferry-boats, the number of passengers of each class that any such steamer has accommodations for, and can carry with prudence and safety.”

(b). Section 4465 of the Revised Statutes of the United States reads as follows:

“It shall not be lawful to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection; and for every violation of this provision the master or owner shall be liable, to any person suing for the same, to forfeit the amount of passage money and ten dollars for each passenger beyond the number allowed.”

(c). Section 4499 of the Revised Statutes of the United States reads as follows:

“If any vessel propelled in whole or in part by steam be navigated without complying with the terms of this Title, the owner shall be liable to the United States in a penalty of five hundred dollars

for each offense, one-half for the use of the informer, for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense.”

(d). The penalty allowed by Section 4465 R. S. is not exclusive of the penalty allowed the Government under Section 4499.

“The Idaho,” (D. C. Ore. 1886) 29 Fed. 187, 190.

II.

The object, and therefore the purpose and intent of the above enactments, has been legislatively and judiciously declared to be: To protect the lives of passengers and of the crew and of property on the particular vessel, as well as the lives and property on other boats and wharves related to the particular vessel by its navigation.

(a). The object, purpose and intent of the legislature in passing this law is shown in congressional debates on an “Act to provide for the better security of life on board vessels propelled in whole or in part by steam,” etc.

Congressional Globe 41st Congress 3rd Sess.
Part 2, 1870-1871, pp. 1321-1328, and 1628.

(i.) The legislative history of a statute may be examined to enable the court to construe it. Lewis Pub. Co. vs. Morgen, (1912) 229 U. S. 288, 324.

(b). In generally construing the provisions in Title LII Revised Statutes of the United States, Regulation

of Steam Vessels, of which the above sections are a portion, the courts have given effect to the legislative object, purpose and intent.

The Hazel Kirke, (C. C. E. Div. N. Y. 1885)
25 Fed. 601, 607.

The City of Salem, (D. C. Ore. 1889) 38 Fed.
762, 763.

United States vs. Nash. et al., (D. C. Ky. 1901)
111 Fed. 525, 526.

Hartranft v. DuPont (1886) 118 U. S. 223, 226.

III.

The act of overloading a steamer is not a true "crime" under this statute.

"The Idaho" (D. C. Ore. 1886), 29 Fed. 187, 191-2;
and the procedure is in admiralty and not in crimes,
"The Ben R." (C. C. A. 6th 1904) 134 Fed. 784, 785.

But the statute, in plain words, makes it an offense to carry passengers in excess of the number allowed by the inspector's certificate, and does not make "knowledge" or "intent" (or use words implying like meaning) elements of the offense. Section 4465, R. S.

Authorities on similar statutes hold such offenses are *mala prohibita* and in the nature of police regulations, where the doing of the act is punished but "knowledge" or "intent" need not be proved.

United States vs. Curtis (D. C. N. Y. 1883) 10
Fed. 184, 186.

United States vs. Leathers (D. C. Nev. 1879)
26 Fed. Cases No. 15,581.

United States vs. Stopello (1904) 8 Ariz. 461,
s. c. 76 Pac. 611, 612.

United States vs. Harmon (D. C. Kan. 1891)
45 Fed. 414, 421.

And under the statute in question it has been adjudged that "knowledge" of the unlawful act is not an element to be proved to constitute the offense.

"The Idaho" (D. C. Ore. 1886) 29 Fed. 187, 191.

The necessity of proof of "knowledge" or "intent" of the offense is negated by this very act which makes the master of the boat liable to a penalty for failure to keep a count of the passengers through either "negligence or design."

Sects. 4467-4468 Rev. Stat. as amended.

The sole question is one of facts as implied in the case
"The City of Lowell" (C. C. 2nd, 1913) 204 Fed.
271, 272.

IV.

Courts have no legislative function but rather endeavor to ascertain the will of the legislative body as expressed in the statute.

United States vs. Goldenberg, (1897) 168 U. S.
95, 103.

And where the intent and purpose of Congress are clear, the Courts must yield to that intent and purpose, even in hard cases, for with the effect of the law the Court has nothing to do.

American Railroad Company of Porto Rico vs.
Birch, (1912) 224 U. S. 547, 557.

Suey vs. Backus, (1912) 225 U. S. 460, 476.

And having ascertained the will of Congress, its purpose must be executed, unless the statute is found to be

inconsistent with the Supreme Law of the Land; Courts cannot mold a statute simply to meet their views of justice in particular cases.

Louisville & Nashville R. R. Co. v. Mottley,
(1911) 219 U. S. 467, 474.

ARGUMENT.

That the "Melville" carried passengers in excess of the licensed number is undisputed by the evidence and found as a fact by the trial court in its opinion. Therefore, according to the Government's theory herein, the offense alleged was committed.

The defense hereto is that there was an unmanageable crowd, over which the officers had no control, clamoring to secure passage on the boat which as soon as it could safely do so, pulled into the stream with the officers not knowing that they had on board more than the licensed number of passengers, and without intention to violate the law.

1. But the testimony concludes as follows:

THE CROWD WAS NOT UNMANAGEABLE.

This conclusion is reached entirely from the testimony of defendant's witnesses:

MR. MORTON stated (p. 37 Apostles):

"Q. It was a friendly affair, though, wasn't it? There wasn't any trouble about it?"

"A. Oh, no, no, there wasn't any blows, anything like that.

"Q. There wasn't any violence at all?"

"A. There was not.

"Q. They came on in a friendly manner, didn't they?"

“A. Yes, sir.

“Q. Everything was friendly?

“A. I guess it certainly was.”

MR. CALLENDER, the general manager of the claimant company, stated (p. 47 Apostles):

“Q. And the people that got on board were men, women and children?

“A. The people that got on board were men, women and children.

“Q. There were about as many women as there were men, weren't there?

“A. I should judge so, yes.

“Q. And quite a few children?

“A. A few children, yes.

“Q. What effort did you make to stop them? There wasn't any violence used?

“A. No violence. I just simply told people, ‘This is a private party. We are not a passenger boat, and we don't want to take anybody up there.’ But it had about as much use as throwing water on a duck's back. They didn't pay any attention to it—just came clambering up the side.”

MR. BRADY, virtually concludes there was no resistance to the crowd's approach other than oral admonitions. (p. 54 Apostles):

“Q. There wasn't any force used to keep them off, was there?

“A. No.

“Q. None whatsoever?

“A. I heard Mr. Callender hallooing to keep back.

“Q. Just to keep back?

“A. Yes.

“Q. Of course, if he had used force, he might have been able to keep some of them off, couldn't he?

“A. Well, if he had hauled around that way, they were getting in where the bow was, they would have gotten into the river, I think, the way the crowd rushed aboard there.”

THE BOAT'S OFFICERS COULD HAVE CONTROLLED THEM.

The boat could have stayed at the wharf until the excess number left the boat, as MR. CALLENDER suggests. (p. 47 Apostles):

“Q. How many people do you think were on when you pulled out?

“A. I don't have the slightest idea.

“Q. At that time how many did you think?

“A. I didn't know. At the time we started to stop the people getting aboard, I didn't think we had too many people on the boat, or I certainly would have stopped.”

Or with some inconvenience, which certainly cannot be urged as an excuse for a violation of the law, MR. CALLENDER admits some passengers could have been kept on the log raft (p. 48 Apostles):

“Q. When you got over to the log raft, you went up close so people could get off on it?

“A. We went up and tied up to the log raft.

“Q. You got off on the raft yourself?

“A. I got off on the raft myself, yes.

“Q. A few others got off?

“A. A few others of us got off.

“Q. At that time you could have forced these people to get off?

“A. We could have forced these people to get off on the log raft. We wouldn't want to put a lot of people that wasn't accustomed to walking on logs out on a log raft.”

At the estimate of the defense there were few who got on after the verbal admonition, so few in fact that the boat had an excess passenger list before the admonition was given:

MR. MORTON states (p. 38 Apostles):

“Q. How many people got on after the captain said, ‘That is enough?’ Have you any idea?

“A. I guess there must have been fifteen or twenty, or more, who got on after that. He hallooed that out for quite awhile, and they were wedged on this slip down there, and they just kept on. I hallooed that was enough, too, there. There must have been fifteen or twenty got on. I know that man threw his baby after I told him that was enough. I couldn't throw it back to him, so I just kept it there.”

THAT THERE WAS NO KNOWLEDGE AND INTENT OF VIOLATION.

While, as MR. CALLENDER states (p. 47 Apostles):

“Q. You did not think you had more than 75 on?

“A. No, I did not know we had. I did not know any were getting on top back there.”

Common sense concludes it is his business under

this law to know how many passengers are taken on board his boat.

A constructive intent (if it should ever be necessary to find intent) is shown by the pulling into the stream without objection to the passenger list.

MR. CALLENDER states (p. 50 Apostles):

“Q. About the captain—I didn’t quite get that. You said the captain sung out?”

“A. He sung out to me, yes. He was up in the pilot-house. He couldn’t see how many people were getting aboard down there, but he realized there was quite a crowd coming, and he sung out to me to stop those people; there was enough.

“Q. Did he make any objection to pulling out with the crowd on?”

“A. No, he didn’t make any objection to pulling out with the crowd on, because he didn’t realize that we had more than we were entitled to.

“Q. He didn’t think you had on more than you were entitled to?”

“A. No, he didn’t have time to go around and look around the boat. I don’t suppose that he knew that there was over the crowd.”

2. And the legal conclusions are as follows:

The purpose of this act, as declared in the title thereto is: To provide for the better security of life and property on steam vessels. The debates in Congress conclude an opinion to such effect. The courts of the land have reiterated it in the following excerpts from their decisions:

BENEDICT, J., in *The Hazel Kirke*, 25 Fed. at page 607, says:

“The object and effect of a provision forbidding the transportation upon a steamboat of passengers in excess of her capacity is plain. It is a regulation respecting the load to be carried by the vessel, and it will hardly be contended, I think, that the navigation of a vessel is not directly affected by the amount of her load. No doubt one effect of a regulation, confined as this one is to the number of passengers to be taken on board a vessel, is to promote the safety of passengers by insuring the safe navigation of the boat in which they are carried. But the safe navigation of other boats is, or may be, also directly affected by such a regulation. The ability of a vessel to stop, to turn, to give room in shallow water, depends, or may depend, upon her load, and her ability in these respects affects, not only the safety of her passengers, but the safety of passengers on other vessels navigating in the same locality.”

DEADY, D. J., in “*The City of Salem*,” 38 Fed. at page 763, says:

“I adhere to the ruling made on the exception to the libel, that the act of carrying this excess of passengers, being plainly contrary to a regulation of commerce prescribed by Congress, which, in the deliberate judgment of that body, is necessary to maintain the safety and security of the river as a highway of interstate commerce, will not be held

legal by me, sitting in this court, on the ground of unconstitutionality of the regulation.”

MR. JUSTICE WOODS, in *Hartranft v. Dupont*, 118 U. S. at page 226, says:

“The purpose of Title 52 is primarily the protection of the passengers and crew and property on vessels propelled by steam. The law was passed also to protect the lives and property of persons on other boats and at the wharves.”

The statute very simply claims: “It shall not be lawful to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection.” There is no requisite that the unlawful act shall *knowingly*, or *intentionally*, or *wilfully* be done. Nor is there such a suggestion in the whole act. These elements do not belong in the statute as SLOAN, J., in *United States vs. Stofello*, 76 Pac. at page 612, says:

“It will be noted that the statute, in plain terms, makes the selling, giving, or disposing of intoxicating liquor to an Indian, a ward of the Government, under the charge of an Indian superintendent or agent, a crime. The word ‘knowingly’ is not used in the act, nor is any word of similar import found therein. An examination of the authorities has satisfied us that the offense created by the statute is of that class of crimes in which *knowledge or guilty intent is not an essential ingredient*, and need not be proven. *The doing of the prohibited thing is made an offense, without regard to the purpose or intent.* Such crimes are in the nature of police regulations, imposing criminal penalties for their

violation, without regard to purpose or intent. *The object of such statutes is to require such diligence as will render their violation impossible, the end sought being the protection of the public.*"*

The same principle is announced by the District Court of the United States in the case of *United States vs. Leathers*, where it was said, in 26 Federal cases, No. 15,581, that:

"The defendant is charged with trading in the Indian country in one count, and with introducing liquors there contrary to the statutes of the United States in another. The statute contains nothing requiring these acts to be done knowingly. The acts themselves are not *malum in se*. The object of the law is not to punish men for these acts as crimes, so much as to prevent trading and intercourse with the Indians otherwise than as the law permits. There is nothing infamous in the punishment prescribed. Under these circumstances, I think it is immaterial with what intent the acts were done. They belong to that class of acts which, in the absence of the statute, might be done without culpability (3 Greenl. Ev. Sec. 21), and being such, ignorance of the lines of the reservation will not excuse, nor will a sincere belief by the defendant that he is outside the lines. He is bound to know the facts and obey the law at his peril. *Id.*; *Reg. v. Woodrow*, 15 Mees. & W. 404; *Attorney General v. Lockwiid*, 9 Mess. & W. 378; 1 Bish. Cr. Law (4th Ed.) 1031, etc.

In the case of *U. S. v. Anthony* (Case No. 14,459), the defendant was charged with illegal voting. The

*Italics ours.

case was tried by Mr. Justice Hunt, and although it appeared that the defendant sincerely believed she had a right to vote, it was held that this did not excuse her. So, on the trial of the inspectors of election for receiving her vote, they proved their good faith, but their ignorance of the want of proper qualifications was held to be no excuse. Cited in Whart. Cr. Law, Sec. 82.

In the case of *Com. v. Mash*, 7 Bete. (Mass.) 472, a woman who honestly believed her first husband to be dead was convicted of bigamy, he not being in fact dead when she married a second man. In this case sentence was reserved and a full pardon obtained. The same doctrine is maintained in England, 3 Whart. 84. So in *State v. Ruhl*, 8 Iowa, 447, the defendant was not allowed to prove that he believed, or had good reason to believe, the girl he enticed away was over fifteen, the law confining the offense to girls under that age. The same principle was asserted in *Reg. v. Olifier*, 10 Cox, Cr. Cas. 402, one judge saying a man dealt with the girl at his peril, and that it made no difference that the girl told him she was over sixteen.

The following cases are cited in Section 8, 3 Whart. Cr. Law: It is no defense to an indictment for voting without the proper qualifications, that the defendant believed he had them. No matter how honest his belief is, unless the statute excepts cases of honest belief. To an indictment for publishing a libel it is no defense that the defendant did not know of the publication. Nor to one for selling liquors to a minor, that the defendant believes the vendee to be of full age. Nor to one for

abduction, that the motives were philanthropic, or that the defendant mistook the girl's age.

In this class of cases the offending party is subjected to penalty for the act done irrespective of his intent, as in civil cases he is required to answer for an act which injures another, however innocent of intentional wrong he may be. My conclusion is, that defendant must be adjudged guilty on both counts. The belief of the defendant in connection with the acts of government agents in setting up the posts can only be considered to determine whether a prosecution shall be begun in the first place, or the degree of punishment in case of conviction, or as ground for a pardon or remission of the forfeitures and penalties."

And with respect to this very statute in question, it has been adjudged that "knowledge" of the unlawful act is not an element of the violation.

DEADY, D. J., in "The Idaho," 29 Fed. at page 191, said:

"This itself is not a crime, nor does the statute make it such. To secure obedience to the statute limiting the number of passengers that may be taken on board, a penalty is imposed on the owner for its violation, although he may in fact have been ignorant thereof."

Therefore, since "knowledge" and "intent" are not elements of this statutory offense, they cannot be judicially legislated into the statute because courts have no such power as MR. JUSTICE BREWER fully states in

United States vs. Goldenberg, 168 U. S. at pages 102-103:

“The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.”

And courts must yield to the legislative intent, as declared by MR. JUSTICE DAY in *Low Wah Suey v. Backus*, 225 U. S. at page 476:

“If it be admitted that the present is a hard application of the rule of the statute, with the effect of such law this court has nothing to do. The provisions of the statute are plain, and it was passed by Congress with full power over the subject. In our view the present case is brought within the terms of the law, when given a reasonable construction with a view to effecting its purposes. If it ought to be amended so as to except from its operation alien wives of American citizens, that result can only be legitimately obtained in the exercise of legislative authority.”

And if the application of the law to the facts of this

case seems harsh (and it need not be so in the slightest degree), yet the Courts should not, and cannot take upon themselves the power to mold this nationally applied safeguard of life and property to favor a particular litigant.

MR. JUSTICE HARLAN, in the case of Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. at page 474, says:

“It may be, as suggested, that a refusal to enforce the agreement of 1871 will operate as a great hardship upon the defendants in error. But that consideration cannot control the determination of this controversy. Our duty is to ascertain the intention of Congress in passing the statute upon which the railroad company relies as prohibitive of the further enforcement of the agreement in suit. That intention is to be gathered from the words of the act, interpreted according to their ordinary acceptation, and, when it becomes necessary to do so, in the light of the circumstances as they existed when the statute was passed. * * * The court cannot mold a statute simply to meet its views of justice in a particular case. Having, in the mode indicated, ascertained the will of the legislative department, the statute as enacted must be executed, unless found to be inconsistent with the Supreme Law of the land.”

Referring again to this alleged defense herein, and granting for the sake of argument, that the crowd in the first instance was unmanageable, that there was no knowledge of the number of passengers on board the

boat, and no intent to violate the law, these proposed defenses absolutely fail when the officers of the "Melville" intentionally take on board from the log raft at St. Helens an orderly crowd whom they had ample time to ascertain were in excess of the number of persons they were allowed to carry, for the purpose of transporting them back to the wharf. Here then, it is submitted is not even the semblance of a defense to the violation of the above statute.

IN CONCLUSION IT IS SUBMITTED:

First: That nowhere is it shown in the evidence that the people were unmanageable, or that once on the boat, the officers could not have requested or forced them to leave, or have held the boat at the slip until they did leave. So many methods of avoiding a violation of the law suggest themselves to the ordinary mind that those charged with the custody of human life and property should be compelled to exercise proper care and duty in their protection.

Second: By the decision of the trial court "knowledge" and "intent" of the officers of the boat in committing the offense, are made elements of the offense to be proved by the Government. These elements are not required by the statute, but are really negatived by Sections 4467 and 4468 R. S. The legal authorities clearly hold that in offenses *mala prohibita*, which are in the nature of police regulations as this statute is, proof of these elements is not material unless made so by statute and such requirement is expressly omitted here. Courts, where the intent of Congress is clear, must yield to that intent, and give effect to the general purpose of the en-

actment and not decree into the statute, requirements not put there by Congress, in order to relieve any particular case of severity.

Third: The principle involved in this case is of the utmost importance in enforcing the laws relating to the carrying of excess passengers on passenger vessels. And if, in view of this decision of the trial court, there is injected into this act and it is made incumbent on the Government to show "intent" and "knowledge" of the offense on the part of the officers of the overladen vessel, it will make practically impossible the enforcement of one of the most important provisions of the steamboat inspection laws having to do with the safety of life and property.

Respectfully submitted,

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United States Attorney for Oregon.

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Assistant United States Attorney,
Proctors for Appellant.

United States
Circuit Court of Appeals
 For the Ninth Circuit.

UNITED STATES OF AMERICA,
 Libellant and Appellant,
 vs.
 CALLENDER NAVIGATION CO. (a Cor-
 poration), Claimant of the Steamer
 "MELVILLE",
 Appellee.

Brief for Appellee.

STATEMENT OF THE CASE

It is contended in this case by the govern-
 ment, that the steamtug "Melville" owned by
 the appellee, on October 12, 1912, carried more
 passengers than permitted by its certificate of
 inspection, and, consequently, the penalty pre-
 scribed by sections 4465 and 4499, Revised
 Statutes of the United States, should be im-
 posed. And to enforce such penalty, this libel
 in rem was instituted, and this appeal prosecut-
 ed.

The evidence submitted at the trial is very
 brief. There is really no conflict in the tes-
 timony. The government called out one wit-

ness, a Mr. H. F. McGrath, Chief Inspector of Customs of the Port of Portland, who testified that on October 12, 1912, whilst standing on the hurricane deck of the steamer "T. J. Potter" as the steamtug "Melville" steamed along by, he counted the passengers then on the tug and his "ticker" registered 119.

He further testified that when the tug steamed back again, his "ticker" indicated 120. It was admitted that the tug "Melville" was not permitted to carry to exceed 75 passengers at that time.

The above is all of the testimony and evidence offered on behalf of the government.

The appellee established the following state of facts, namely:

That on October 12, 1912, the day in question, the St. Helens Ship Building Co. had completed a large steamboat named "Multnomah" in its ship yards on an island in the Columbia River opposite the Town of St. Helens, a distance of about one-quarter of a mile from the dock at St. Helens, and had issued a number of invitations to the steamboat men on the Columbia River to be present and witness the launching of such boat, which was to be in the afternoon of that day. This was the first launching of a steamboat of that size and character on the Columbia River, and was quite an event, particularly among steamboat men, and the event was very widely attended. At that time, the appellee Callender Navigation Co. was the owner of the steamtug "Melville", which it employed in the tug business. This tug was, naturally, very

strongly built and quite powerful. It could carry with perfect safety over 200 people. The tugboat had never been employed as a passenger boat, although it was well fitted up and suitable for that purpose, and the license to carry passengers had been obtained as a mere matter of convenience to the general manager, Mr. C. H. Callender, so that he and his family could entertain their friends. Mr. Callender, general manager of the appellee, received an invitation to be present at the launching of the steamboat "Multnomah", and the steamtug "Melville" being at that time available, he conceived the idea of inviting a number of his personal friends to journey from Astoria, Oregon to the St. Helens Ship Building Co. to witness the launching. He, therefore, invited not to exceed 15 of his personal friends, and on the morning of October 12, 1912, they went aboard the boat at Astoria and proceeded to the ship yards of the St. Helens Ship Building Co. The incident that took place and the events that caused the carrying of the number of passengers complained of is best related in Mr. Callender's own words (Apostles, pages 41-45.)

Q. I wish you would detail to his Honor here the facts pertaining to the taking and carrying of these passengers with which you are charged. Just explain it.

A. Well, I invited a few of my own friends in Astoria to make that trip, to go up and see the launching of this big ship. As long as it had been the first one that was launched in the Columbia River, it was quite an event. I think

there were about 12 or 15 of us took the boat in the morning and figured on getting up there possibly an hour before the launching—figured on looking around the mill. We were a good deal longer coming up than we figured on. When we arrived at St. Helens dock, was going by there, we realized it was just about the time the ship was to be launched. Going by the wharf there, we saw quite a number of people on the wharf, and we heard somebody hallooing. And I looked over there and saw several of my friends there—Mr. Morton, Mr. Yeon and Mr. Brady, and Mr. McCormack, and two or three people from Astoria, Mr. Halterman and several others. So I snug out to the captain to swing around and make a landing, and we would pick those people up. As we went in there was a wide slip, possibly ten or fifteen feet wide. As we started to go in there, these people began to jump into that slip. We ran the nose of the boat in there, and Mr. Morton was pretty well back of the crowd with his folks, and in trying to get them through the crowd, and get them down there, of course everybody began to jump aboard. I tried to hold them back. They all halloed there was no other boat—“We can’t get up there.” In our efforts to get Mr. Yeon and Mr. Brady and Mr. Morton and the ladies aboard, this crowd kept piling in. I didn’t realize there was anybody coming on top of the boat till after we started to back away, I saw a whole crowd of them on the boat, jumping over on top of our house. Of course, we tried to stop them just as soon as I saw the rush. But when

they started to crowd into the slip there like a lot of cattle, people on back end of the slip shoving the front ones aboard the boat, if the boat had pulled away very suddenly it would have pulled them all overboard. As soon as we stopped and got our boat away, we backed right away. We didn't have lines out or anything else. We just had her nose up against the dock. We stopped and backed her away as soon as we could, till they realized they was going to get overboard, then they halloed "quit". We proceeded up close to the dock and along close to the log rafts. I don't think any of the time we was more than two or three lengths of the boat away from the shore. We tied up to the log raft right across from where the launching took place. As soon as the steamer was in the water we went right back to the dock and put this crowd off. I don't think it was over a quarter of a mile from the wharf up to where the ship was launched. It possibly might be a little more, but I don't think it is.

(Examination by the COURT.)

Q. You took the same crowd back that went over?

A. Yes, the same crowd back. I don't think anybody got off. Of course, there were a few people, after the boat tied up to the log-raft, got off. I did. I was in the lumber business—while I was waiting there for the launching, I got off on the raft, and several people got off.

Q. Were there any people on the raft.

A. I think there were. There was a lot of these little fishing boats and pleasure boats, and

two or three rafts of logs all up and down the slough, quite a number of boats tied up there, and people walking around on the raft, as I remember.

Q. Do you remember whether any more people got on your boat?

A. No, I am satisfied there wasn't anybody got on there. I don't think they did.

Redirect Examination.

Q. Was there any charge made for any of these people?

A. No charge at all. We were simply out for a picnic.

Q. Would you have permitted these people to have gotten aboard, could you have avoided it?

A. I should certainly not. I didn't want them aboard there. We had a little party of our own, and we had some refreshments served in the cabin there, some sandwiches and things. We were just having a little party. I didn't want any strangers aboard the boat. I didn't know these people.

Q. They were not friends of yours?

A. I didn't know any of them, with the exception of just that few that I went in there to pick up.

Mr. FULTON.—I assume your Honor is familiar with the waters around St. Helens.

A. It is in a slough. It is not in the main river. From the St. Helens dock up to where we took these people, up to the shipbuilding plant, it is just a narrow slough. I don't think the slough is over a quarter of a mile wide.

Q. How is it protected against storms?

A. Absolutely no chance for any rough water in there. It is just like a millpond in there, just like a lake, up from the St. Helens boom to the mill, extends up clear to the shipbuilding plant, there were rafts moored clear along there. I don't think at any time we steered more than a couple of boatlengths away from those logs. There was absolutely no danger at all.

Q. How many people could your boat at that time safely have carried?

A. We could safely put 200 people on that boat, without crowding her very much. Big open-deck tug-boat—she has open deck all the way around her. Her stern is a big open stern and her bow the same. And then on top of her house there is lots of room. I think 200 people could be carried.

The testimony of Mr. Callender was corroborated by his three friends, for whom he made the landing at St. Helens. The government made no attempt whatever to contradict any statement made by Mr. Callender, or his friends, and offered no testimony in rebuttal. It is, therefore, fair to assume that the statements made by Mr. Callender and verified by the witnesses called on his behalf were in every respect true.

Another important matter which we wish to call the Courts attention to is, that it is not contended by the government that the carrying of the passengers complained of was other than as stated by Mr. Callender and his witnesses: and no contention is made that the officers of the

tugboat sought to evade the law by any subterfuge. No charge whatever was made for carrying these passengers—in fact, it is too apparent that they were not wanted on board the boat and came on there against the will and protest of the general manager of the appellee and the officers of the boat. Indeed, they forced themselves on the boat, and the officers were powerless to prevent it.

The contention of the government in this case is to our mind rather remarkable to say the least. As we understood the United States Attorneys in the court below, and as we read their brief in this case, it is contended that the penalty prescribed by Section 4499, Revised Statutes of the United States, must be as of course be imposed upon every vessel which carries a passenger beyond the number authorized by its certificate of inspection. And that intent or knowledge on the part of the officers and owners has nothing whatever to do with the question. It is argued at great length that inasmuch as it has been held by the Federal Courts in prosecutions under the above mentioned section, that it is not necessary for the government to show, in the first place, knowledge or intent on the part of the officers of an offending vessel, that there can be no excuse interposed, where the evidence shows that the passengers carried exceeded the limit. The Court below did not entertain this view of the law, and dismissed the libel.

The government prosecutes this appeal.

Points and Authorities.

I.

Section 4465, R. S. U. S. reads as follows:

“It shall not be lawful to **take** on board of any steamer a greater number of passengers than is stated in the certificate of inspection.”

It will be observed that the prohibition is against the taking, not the carrying against the will and consent of the officers, nor against the taking against the will and consent of the officers. Although the government in a suit to recover a penalty under Section 4499, R. S. U. S., is not required, in the first instance, to show that excess passengers were carried with the knowledge of the officers, or any of them, yet it does not follow that the officers may not justify their acts in so doing; neither does it follow that the penalty must be imposed, even though the officers were powerless to resist carrying excess passengers.

We submit that the offense is confined to a voluntary taking of passengers in excess of the number stated in the certificate of inspection.

The Geneva, 26 Fed. 647.

The Nelson, 149 Fed. 846.

II.

As we understand it, the government admits in this case that the facts detailed by the evidence on behalf of the appellee were true, and the defense interposed by appellee is an honest one, and all of the facts occurring at the time were honestly and correctly detailed.

The only contention on the part of the government is, that under the facts disclosed by the

evidence offered in defense, which are admitted to be true, the penalty, nevertheless, must in law and in equity be imposed. We believe it to be the universally accepted construction of the sections in question, namely, Sections 4464, 4465 and 4499, R. S. U. S., that where passengers obtrude themselves on board a steamboat against the will and consent of the officers, under circumstances which ordinarily could not be prevented, does not subject the boat to the penalties prescribed by these sections.

The Geneva, 26 Fed. 647.

The Nelson, 149 Fed. 846.

Argument.

I.

We agree that the rule is well settled that in proceedings in rem instituted by the government to recover the penalty imposed by Section 4499, R. S. U. S., the government is not required to establish the fact that the officers of the offending steamboat had knowledge that the boat was carrying passengers in excess of its certificate of inspection. This, in our judgment, has absolutely nothing whatever to do with this case. The only proposition involved in the case, as we understand it, is whether or not the facts detailed by the witnesses for the appellee, which are admitted to be true, are a justification on the part of the appellee in carrying excess passengers. While we do not admit it to be a fact that the evidence shows the "Melville" did carry excess passengers on October 12, 1912, yet it seemed to be the opinion of the Court below that the evidence established that fact, we

are willing to accept the findings of the learned trial judge as the facts in this case. But the trial judge held that the facts established by the appellee were such as not to bring it within the inhibition of the above mentioned sections.

We respectfully submit that there are many instances that might well arise, which naturally suggest themselves to this Court, without enumeration, where a steamboat might well carry an excess of passengers, and there are other instances which also might naturally arise, which likewise suggest themselves to the Court, where a steamboat might be compelled to carry an excess of passengers, and in neither case subjects itself to the penalty prescribed by this section.

We find a demonstration of these propositions in the two cases, namely, *The Geneva*, 26 Fed. 647, and *The Nelson*, 149 Fed. 846.

In the latter case, Judge Hanford, in an excellently well prepared opinion, stated the law to be as follows:

“A Court of equity may, in the exercise of a wise discretion, refuse to impose upon the owner of a steamboat the penalty prescribed by section 4465 for carrying more passengers than the number allowed by the vessel’s inspection certificate, where, because of extraordinary conditions existing, such imposition would be inequitable.”

In a case parallel with the case at bar, Judge Acheson, in *The Geneva*, 26 Fed. 647, lays down the rule that where more passengers than are permitted by the vessel’s certificate of inspec-

tion force themselves on board a steamboat against the consent and protest of the officers. under circumstances identical with the facts in this case, that the penalty prescribed ought not, and, as a matter of law, should not, be enforced.

The counsel for appellant in their brief have sought to avoid the force of the above case, by selecting short excerpts from the testimony of the witnesses on behalf of the appellee and have drawn a deduction therefrom not intended by the witness and far from being a fair construction of the witness' entire testimony, attempting to show that there was no rough element in the crowd, and that the officers had neglected to use meat axes, knives, shot guns and crow-bars in preventing the crowd from forcing themselves on the boat. The overwhelming testimony shows that the "Melville" simply put its nose against the slip on the St. Helens dock; that the vessel was not moored, and no lines were thrown out or made fast. The evidence also shows that this slip had a drop of about 33 degrees and was about 10 or 15 feet wide. The evidence shows that the crowd simply filled this slip, and those behind, in their eagerness to get aboard, shoved those in front practically onto the boat. The evidence is also overwhelming that the boat could not have been backed away from the slip without precipitating a number of women and children into the waters of the Columbia River. And because the officers of the boat did not do this, and did not drown a few of the citizens of Oregon, an argument is made that the officers could have prevented these

people from boarding the boat. The Court will read this testimony and will give it a fair interpretation, and will consider it in the light those present at the time viewed it.

It is inconceivable that Mr. Callender, manager of the appellee and who had charge of the "Melville" at this time, desired these people on the boat. He had with him his personal friends, and he also had provided for his guests special refreshments for their particular use, and in landing, he anticipated only in taking aboard three or four of his personal friends with their families, not to exceed a dozen people.

It is, therefore, fair to assume that it was farthest from the intention of the officers of the boat to take any on board other than Mr. Yeon, Mr. Brady and Mr. S. C. Morton, and his lady friends. No compensation was attempted to be made for carrying these passengers, and none was contemplated.

Furthermore, the evidence shows that the crowd on the wharf sprang onto the boat from every conceivable position, a large number jumped from the wharf down onto the upper deck, others came on aboard at the stern, others on the side. Indeed, the rush was so great that parents parted from their children, in the mad rush to board the tug.

It is quite true, in the case of *The Geneva*, the officers gave a rather lurid description of some of the individuals who were not on the boat. That, we apprehend, had nothing whatever to do with the principle announced in that case. Mr. Callender was not a pugilist, was not a

fighting man, and we think it is fair to assume that Mr. Morton was not either, although he made the statement that he would have gone aboard any boat that came along, and it is fair to assume that such was the intention of the people there.

It is true the occasion brought forth quite a large body of people; it is also true that they were good people; and that is, doubtless, one of the reasons why it was not the desire of the officers of the "Melville" to precipitate any of them in the river and thereby cause their death.

Mr. Callender testified that he succeeded in stopping the crowd before he thought that there were more on his boat than it was authorized to carry, but he did not know that so many had gotten on the boat other than through the slip. It was impractical for him to return to the wharf, or tie up there. Had he returned, he would have been forced to receive a greater crowd. The boat was absolutely safe, the waters were practically a millpond, and there was absolutely no danger to any passenger.

But above all, it seems there can be no question but that the officers of that boat did not wish these passengers. The boat did not land for them, the officers protested and objected to their coming aboard, and the boat could not have been backed away from the wharf without loss of life.

The Court below, an eminent jurist, heard the testimony offered on behalf of the appellee, he saw the witnesses, many of them he knew personally, and after listening to their evidence and

giving the same a fair interpretation, followed the rule announced in the two cases above mentioned.

The amount involved in this appeal is not very large, and the facts do not justify, in our judgment, the prosecution of an appeal to this Court. The appellee was advised that it had not violated the law, and it frankly submitted its case to the Court below, being then and there ready and willing to abide by whatever judgment the District Court should enter. Doubtless, had it thought that this case would be appealed to this Court, rather than to have gone to the expense of defending it in this Court, it would have paid the government any reasonable sum of money simply to buy its peace.

If it is the intention of the government to appeal every case of this character and put an innocent defendant to the expense of defending in both Courts, even though the defense should be perfect, any attorney having the interest of his client at heart, when a claim of any character is filed by the government, would naturally advise that it should be paid. This is, evidently, the theory of this appeal.

While it is true the United States is complainant in this case, we submit that the prosecution is moved by men the same as the defense is sustained by men, and, in that regard, we trust this Court will assume they are equal.

The defense interposed here is an honest one. No contention is made but that every witness for the appellee honestly stated everything that occurred as he saw it. It is also admitted that

the appellee made no charges, and never intended so doing. It must also be admitted that the officers of the "Melville" did not wish any of the passengers to board the boat to exceed 12 people. It must be conceded that all above that forcibly went aboard the tug against the earnest protest and objection of the officers. It must further be found that the officers were powerless to prevent them from so doing. This taken with the fact that when the crowd started to board the tug, it could not back away from the wharf without precipitating a number of people into the waters of the Columbia River, all of whom, undoubtedly, would have been drowned.

These being the facts as found by the Court and as clearly established by the evidence, we respectfully submit that the decree of the Court below ought to be affirmed.

G. C. FULTON,
Proctor for Appellee.

IN THE
United States Circuit Court
of Appeals
for the Ninth Circuit.

IN ADMIRALTY.

UNITED STATES OF AMERICA
Libellant and Appellant

vs.

THE STEAMER "MELVILLE," her Tackle,
Apparel, Furniture, Etc.
Defendant

CALLENDER NAVIGATION CO., a Corpora-
tion,
Claimant and Appellee.

Reply Brief of Appellant.

STATEMENT.

This reply is not made because of any oversight in the original brief. It relates to matters beside the direct line of liability indicated therein. The purpose of now adding this statement and authorities is to apprise the Court of the Government's knowledge of adverse rulings on the question now to be adjudged, to suggest a rem-

edy, to pray that that the trial courts be directed to follow the remedy indicated by the legislature, and while called a reply brief, it is not strictly such because written before appellee's brief has been seen, but in anticipation of a very apparent defense of that party.

POINTS AND AUTHORITIES.

I.

Under extremely mitigating circumstances two district courts have dismissed libels under this section to recover penalties for overcrowding:

(1) Because of intrusion against will and under a species of compulsion;

(2) Because of intrusion of those who came on board in the darkness and when there was no intent on the part of the ship owners to violate the law.

(1) "The Geneva" (D. C. W. D. Pa. 1886) 26 Fed. 647.

(2) "The Charles Nelson" (D. C. W. D. Wash. 1906), 149 Fed. 846.

II.

When parties have been found guilty of this violation and mitigating circumstances appear in the case, upon proper presentation thereof to the Secretary of the Treasury, the penalty may be remitted in whole or in part.

Authority for this remission is found in Section 5294 Revised Statutes:

"The Secretary of the Treasury may, upon application therefor, remit or mitigate any fine, penalty, or forfeiture provided for in laws relating to

vessels or discontinue any prosecution to recover penalties or relating to forfeited denounced in such laws, excepting the penalty of imprisonment or of removal from office, upon such terms as he, in his discretion, shall think proper; and all rights granted to informers by such laws shall be held subject to the Secretary's powers of remission, except in cases where the claims of an informer to the share of any penalty shall have been determined by a court of competent jurisdiction prior to the application for the remission of the penalty or forfeiture; and the Secretary shall have authority to ascertain the facts upon all such applications in such manner and under such regulations as he may deem proper."

The discretion of the Secretary of the Treasury could be safely trusted in such matters, and furnish a much safer guide than could be afforded by judicially excepting certain cases like the one in question from the scope of the law.

"The Scow No. 1" (D. C. E. D. N. Y. 1909),
169 Fed. 717.

"The Laura" (1885), 114 U. S. 411.

III.

The courts must yield to the intent and purpose of the legislature (Appellant's Brief, page 19) and if the statute is to be amended to prevent its operation in particular cases, that result can be accomplished only by an exercise of legislative authority.

Suey vs. Backus (1912), 225 U. S. 460, 476.

ARGUMENT.

After diligent search, only two reported cases have been found, adjudicating a point similar to the one in question. These cases, "The Geneva" (which will be called the "grape-and-cannister" case) and the "Charles Nelson" (which will be called the "rescue ship" case), are easily distinguishable, but it is hoped this court will go further and correct the "legislative" tendency of the District Courts and throw the remedy for harsh penalties, if any there be, into proper channels.

The case of the "Geneva" was one in which a steamboat *licensed to carry 300*, carried 500 passengers, *a distance of two squares*, where, *by persuasion of its officers and their own apprehensions, all but 200 disembarked* and the boat proceeded on its excursion trip with *less than the licensed number*. When the "*immense mass*" of people attempted to board the boat, *staging was torn away to stop them*, the officers "*exerted themselves to the utmost* to prevent persons getting on the steamboat," and the man in charge stated:

"*Had I had two cannon with grape and cannister I could have kept the people off, but not otherwise.*" The Court said: "It was impossible for him (the captain) to disembark his passengers at that time and place (wharf where the crowd embarked); nor had he the force to expell intruders. Indeed, *had he attempted such a thing, it would have brought on a serious riot*. There were many rough characters in that crowd, both on and off the Geneva. *Capt. Clark, therefore, was in the strict line of his duty* when he moved the Geneva

from the mouth of Wood street down to Ferry street" (two blocks).

The case of the "Charles Nelson" was a libel *by disgruntled passengers* to recover penalties because of discomforts suffered by having 14 extra steerage passengers aboard on a trip from San Francisco to Seattle. Only the licensed number of tickets were sold and all other applicants were refused passage. But 11 steerage passengers and 3 stowaways *sneaked aboard* under cover of night and *were not observed until the boat was some hundred miles at sea*. The voyage was two or three days longer than usual by reason of stormy weather which, together with the overcrowding of steerage quarters, lack of food, fuel and slow means of securing fresh water created the discomforts complained of. The Court through Hanford, D. J., said:

"It is the opinion of the court, however, that the extraordinary conditions existing at San Francisco when the voyage was undertaken (May 2, 1906) justify and require the exercise of judicial discretion and that according to the principles of equity the libellants are not entitled to prevail.
* * * The appalling disaster which suddenly rendered a great multitude of people in San Francisco homeless and destitute is a matter of common and general knowledge, and due credit should be given to the generous impulses of officers and managers of railroads and steamship lines which prompted them to make extraordinary exertions to facilitate the emigration of the many who hastened to leave the ruins and desolation which sur-

rounded them in that city. It is plainly apparent that the desire of the libellants to get away from San Francisco was too strong to admit of any questioning of the sufficiency of the accommodations afforded by the Charles Nelson before going on board of her, *and their demands are as ungracious as would be the case if they had been castaways and were suing a rescuing ship which had brought them away from a desolate shore.* The evidence proves that the officers of the Charles Nelson did not intend to oppress the libellants nor to violate the law by receiving on board an excessive number of passengers, and the overcrowding of the ship was occasioned by the intrusion of those who came on board in the darkness."

The italicised portions of the above cases are ours to indicate grounds of very apparent distinction between them and the case of the "Melville." Though these cases were not actuated by the same principles that prompt the government (both being for financial gain), and are *distinguishable, it is hoped that this Court will correct the* reasoning of the District Courts and in accordance with the rule laid down by the United States Supreme Court, viz.: Courts have no legislative function but should yield to the intent of Congress and not mold a statute to meet the views of justice in a particular case, force the trial courts to ascertain whether or not there has been a violation of the statute in accordance with the intent of Congress, with the question of the "intent" and "knowledge" of the violater removed from consideration.

Upon conviction, if the fixed penalty of \$500 is

thought to be harsh or unconscionable, the aggrieved parties may lay the case before the Secretary of the Treasury, and have justice done without embarrassment to the judicial branch of the Government:

Nothing indicates that the trial courts in the "grape-and-cannister" and "rescue-ship" cases had this pardoning statute suggested to them as a relief from an alternative of working a hardship or enacting "judicial legislation." We respectfully submit the following as an accurate description of the facts and an indication of the remedy in severe cases. CHATFIELD, District Judge, for the Eastern District of New York, stated in the decree in "The Scow No. 1" (*supra*), that:

"It is unnecessary to enlarge upon the disaster which might have resulted if any accident requiring the use of boats or life-preservers had occurred. The examples are many, and the necessity for regulations with relation not only to boats in the passenger-carrying business, but to boats used for more or less charitable purposes, is admitted by every one. Many of the most distressing instances of great loss of life have been in connection with such expeditions as Sunday school picnics and children's parties at theaters and other public places. The hardship that may be involved to the charitable and well disposed in complying with requirements providing precautions which may be entirely unnecessary (if nothing occurs) cannot be weighed in the balance with the tremendous loss of life which may result through the natural feeling that the law was not aimed at people of such good intentions and good character. Nevertheless, no amount of respect for the law and willingness to abide

by it, where no hardship is involved, can restore those who might be lost or injured if the possible accident should occur.

It has been well established in many cases, including the *Hazel Kirke* (C. C., 25 Fed. 601; *The Garden City* (D. C.), 26 Fed. 766; *The City of Salem* (D. C.), 37 Fed. 846; *The Oyster Police Steamers of Maryland* (D. C.), 31 Fed. 763; and *Hartranft v. DuPont*, 118 U. S. 225, 6 Sup. Ct. 1188, 30 L. Ed. 205—that all vessels carrying passengers within the jurisdiction of the United States under either the interstate commerce clause or the admiralty provisions of the Constitution) are liable to the regulations provided by statute. * * *

“A violation of the statute, if disaster followed, must necessarily be severely punished. If the excursion happily proceeds without accident, the matter may be less serious, and it is suggested that an application to the Secretary of the Treasury, under the provisions of section 5292 of the Revised Statutes (U. S. Comp. St. 1901, p. 3604), would be the proper procedure. The discretion of the Secretary of the Treasury could safely be trusted in such matters, and furnish a much safer guide than could be afforded by excepting charitable or casual excursions from the scope of the law. If the claimant in the present case, instead of disputing jurisdiction, should lay the matter before the proper authorities, he probably will find full justice and avoid opening the door to those who desire to be put to as little expense as possible in protecting life,

even in matters as to which Congress has deemed it necessary that such protection should be afforded."

IN CONCLUSION, IT IS SUBMITTED:

First: The decisions in the "grape-and-cannister" and "rescue-ship" cases are attempts to relieve them of severity as against informants claiming financial benefit. These cases are otherwise distinguishable from the "Melville" case on their facts. Their reasoning under the purpose sought to be effected is dangerous to the enforcement of a salutary law of the United States. The amendment they effect can only be accomplished by congress.

Second: That a rule should be promulgated governing the trial courts in their interpretation of this statute, which will adjudge that "knowledge of" and "intent to commit" the offense are not elements thereof; that the doing of the unlawful act is sufficient to constitute the violation which is penalized; that severity in any particular case will find adequate relief in the conscience of the Secretary of the Treasury.

Third: That a decree should be entered against the "Melville" and the claimant and in favor of the United States.

Respectfully submitted,

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